



NOTE

**Recentering Section 1988 in
Constitutional Torts**

Leo Rassieur*

Abstract. Constitutional rights do not enforce themselves. The constitutional tort, generally taking the form of an action under either Section 1983 or *Bivens*, is one important vehicle for individuals to vindicate their constitutional rights. Jurists and civil rights scholars have documented the many barriers to relief under these two causes of action—official immunities, governmental immunities, and justiciability doctrines, to name a few.

Less attention has been given to the Supreme Court's recent series of cases importing the elements of common-law torts into constitutional tort claims. Nor has recent scholarship examined Section 1988, which provides that if federal law is "deficient in the provisions necessary to furnish suitable remedies" in cases under Section 1983, courts may look to "the common law" of the forum state so long as it is "not inconsistent with the Constitution and laws of the United States." Curiously, however, the Court has imported common-law tort elements into Section 1983 without mentioning Section 1988. The Court has thus never asked whether those elements are necessary to remedy a deficiency in—or even consistent with—federal law. Nor has the Court explained why only some Section 1983 plaintiffs must prove the elements of a common-law tort and others need not.

This Note interprets Section 1988 and recenters its role in the law of constitutional torts. First, it critiques the Court's methodology in determining the elements of Section 1983 constitutional tort claims in a string of recent decisions. Second, it interprets the text of Section 1988 and contends that it should apply beyond its current narrow role, which is largely limited to survivorship and statutes of limitations. Finally, it applies Section 1988 to the elements and immunities problems that have long plagued constitutional tort law, arguing that the statute forecloses the Court's wholesale importation of common-law tort elements into Section 1983 claims.

* J.D., Stanford Law School, 2025. I am forever indebted to Pam Karlan for her guidance, mentorship, and wit throughout the writing of this Note, as well as for exposing me to the world of civil rights litigation. I am also deeply grateful to Easha Anand, Morgan Weiland, and Alex Yudelson for their encouragement and insightful comments. Lastly, I thank the tireless editors of the *Stanford Law Review*, especially Claire Dinshaw, Danny Sharp, Hana Ryan, as well as Sarah Bowen, Sara Carrillo, Hannah Dahleen, Harry Sage, Manon Theodoly, Arjun Ravi, Abigail Wolfe, Isabella Yepes, and Jessica Zhu.

Table of Contents

Introduction	1081
I. Section 1983 as a Prism for Constitutional Rights Enforcement.....	1084
A. Textual Elements of Section 1983 Claims.....	1085
B. The Common Law of 1871 as a Source of Elements of Section 1983 Claims.....	1087
1. The origins of the common-law analogy in Section 1983 cases.....	1089
2. First Amendment retaliation claims.....	1090
3. Fourth Amendment malicious-prosecution claims.....	1093
4. Doctrinal and normative critiques of the common-law approach.....	1097
C. The Constitution as a Source of Elements of Section 1983 Claims.....	1099
II. Section 1988 as a Choice-of-Law Rule for Section 1983 Claims.....	1101
A. Section 1988 as a Source of Rules of Limitations and Survivorship.....	1101
1. Limitations.....	1102
2. Survivorship.....	1102
B. Section 1988’s Three Steps	1103
1. Are “the laws of the United States” “deficient” in “furnish[ing] suitable remedies”?	1104
2. Does “the common law,” as “modified” by the forum state, provide a rule of decision?	1109
3. Is the common-law rule of decision “not inconsistent with the Constitution and laws of the United States”?.....	1111
C. Expanding the Scope of Section 1988.....	1112
1. The negative-implication canon.....	1113
2. The common-law derogation canon	1115
3. Statutory stare decisis and congressional acquiescence.....	1116
III. Applying Section 1988 to the Elements and Immunities of Section 1983 Claims	1119
A. Elements.....	1119
B. Immunities.....	1121
Conclusion.....	1123

Introduction

Section 1983 authorizes damages suits against state officials for violations of constitutional rights—that is, constitutional tort suits.¹ Despite being “one of the most well-known civil rights statutes” and producing tens of thousands of cases annually, Section 1983 contains just one pithy paragraph of text.² It has no statute of limitations.³ Nor does it reference immunities like prosecutorial immunity, judicial immunity, or qualified immunity.⁴ So, one might wonder: Should courts supplement the text of Section 1983 with rules found elsewhere? And, if so, where should we look for those rules?

Section 1983’s companion statute 42 U.S.C. § 1988 governs whether and how common-law rules apply to Section 1983 claims.⁵ Enacted five years before Section 1983, Section 1988 provides a three-step framework for applying state common-law rules in civil rights cases.⁶ First, a court must determine whether “the laws of the United States” are “deficient in . . . furnish[ing] suitable remedies.”⁷ If not, the federal-law rule governs. Second, if the federal-law rule is deficient, the court must then identify the applicable rule of “the common law, as modified and changed” by the laws of the forum state.⁸ Finally, the court applies that state-law rule if “not ‘inconsistent with the Constitution and laws of the United States.’”⁹ Take statutes of limitations, for instance. Since Section 1983 lacks a statute of limitations, federal law is deficient and courts must apply the forum state’s relevant statute of limitations, so long as consistent with the Constitution and federal law.¹⁰

For as straightforward as that statutory approach may appear, however, the Supreme Court has only applied Section 1988 in two narrow contexts:

-
1. See 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled in part on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).
 2. See *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020); *Table C-3—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary (December 31, 2025)*, U.S. CTS.: DATA & NEWS, <https://perma.cc/HX4B-Y3ZD> (archived Apr. 22, 2026); 42 U.S.C. § 1983.
 3. See 42 U.S.C. § 1983.
 4. *Id.*
 5. See Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1988); Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986).
 6. 42 U.S.C. § 1988(a); *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984).
 7. See 42 U.S.C. § 1988(a); *Burnett*, 468 U.S. at 47-48.
 8. *Burnett*, 468 U.S. at 48 (quoting 42 U.S.C. § 1988(a)).
 9. *Id.* (quoting 42 U.S.C. § 1988(a)).
 10. See *infra* Part II.A.1.

survivorship and statutes of limitations.¹¹ That oversight is striking because, in five cases over the last decade—*Manuel v. City of Joliet*, *Nieves v. Bartlett*, *Thompson v. Clark*, *Chiaverini v. City of Napoleon*, and *Gonzalez v. Trevino*—the Court has required Section 1983 plaintiffs to prove the elements of an analogous common-law tort, without ever citing Section 1988.¹² Instead, the Court has simply assumed that Section 1983 has gaps that must be filled by “look[ing] first to the common law of torts.”¹³

Nieves illustrates how the Court imports common-law elements into Section 1983 claims. There, Russell Bartlett sued Alaska State Trooper Luis Nieves for arresting him in retaliation for his First Amendment-protected speech, invoking Section 1983.¹⁴ The Ninth Circuit ruled that Bartlett was entitled to a trial on that First Amendment claim.¹⁵ The Supreme Court reversed, but not on First Amendment grounds.¹⁶ Instead, the majority reasoned that it must “defin[e] the contours of a claim under § 1983” by “look[ing] to ‘common-law principles that were well settled at the time of its enactment.’”¹⁷ But “in 1871, there was no common law tort for retaliatory arrest based on protected speech.”¹⁸ The closest analogs were “false imprisonment or malicious prosecution.”¹⁹ And probable cause was a defense to those torts.²⁰ So even though the First Amendment says nothing about probable cause, Bartlett lost because Nieves had probable cause to arrest him for interfering with an investigation.²¹

Startlingly, the handful of scholars to critique the Court’s common-law approach to the elements of Section 1983 in cases like *Nieves* have also ignored

-
11. See *infra* Part II.A. The Court last cited Section 1988(a) in 2005 in passing while discussing statutes of limitations. See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 124 (2005).
 12. *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019); *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022); *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745, 1750 (2024); *Gonzalez v. Trevino*, 144 S. Ct. 1663, 1667 (2024) (per curiam).
 13. See *Manuel*, 580 U.S. at 370; *infra* Part I.B.
 14. *Bartlett v. Nieves*, No. 4:15-cv-00004, 2016 WL 3702952, at *3, *11 (D. Alaska July 7, 2016), *aff’d in part, rev’d in part*, 712 F. App’x 613 (9th Cir. 2017), *rev’d*, 139 S. Ct. 1715 (2019).
 15. *Nieves*, 712 F. App’x at 616.
 16. *Nieves*, 139 S. Ct. at 1727–28.
 17. *Id.* at 1726 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997)).
 18. *Id.*
 19. *Id.*
 20. *Id.*
 21. *Id.* at 1728; see *id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part).

Section 1988.²² They, too, assume that Section 1983 “raised questions about how the new constitutional claims related to the old common-law claims,” without considering whether Congress answered those questions elsewhere in the statutory structure.²³ Likewise, the few scholars to write on Section 1988 have not questioned the Court’s conclusion that Section 1983 plaintiffs must prove the elements of a common-law tort.²⁴ It is little wonder, then, that some have concluded “no one knows what” the “profoundly mysterious” Section 1988 means.²⁵

This Note fills that gap, doctrinally and normatively critiquing the Court’s atextual project of importing the common law into Section 1983 while

-
22. See, e.g., Timothy Tymkovich & Hayley Stillwell, *Malicious Prosecution as Undue Process: A Fourteenth Amendment Theory of Malicious Prosecution*, 20 GEO. J.L. & PUB. POL’Y 225, 267-74 (2022) (suggesting locating Section 1983 malicious-prosecution claims in the Due Process Clause of the Fourteenth Amendment rather than the Fourth Amendment because malicious prosecution should not require proof of an objectively unreasonable seizure); E. Garrett West, *Refining Constitutional Torts*, 134 YALE L.J. 858, 902-06 (2025) (criticizing the Court for not “explain[ing] the point of that [common-law] analogy or apply[ing] it consistently”).
23. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 52 (2018); see, e.g., Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 973-78 (2019); Michael Wells, *Constitutional Remedies, Section 1983 and the Common Law*, 68 MISS. L.J. 157, 167, 176 (1998); Charles W. Tyler, *Common Law Statutes*, 99 NOTRE DAME L. REV. 669, 701-09 (2023); see also Anita S. Krishnakumar, *The Common Law as Statutory Backdrop*, 136 HARV. L. REV. 608, 617 (2022) (“[T]he statutory interpretation literature has been fairly quiet about the use of the common law to interpret statutes.”).
24. Nor could they have: To my knowledge, there are only four such papers, with the latest one preceding said Section 1983 elements cases by nearly three decades. Compare Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51 (1989) (discussing the Court’s limited application of Section 1988 and scholars’ disagreement about the statute’s meaning), Jennifer A. Coleman, *42 U.S.C. Section 1988: A Congressionally-Mandated Approach to the Construction of Section 1983*, 19 IND. L. REV. 665 (1986) (arguing that Section 1988 should govern the question of immunities in cases brought under Section 1983), Seth F. Kreimer, *The Source of Law In Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985) (arguing that Section 1988 should be read to permit courts to create federal common-law rules to fill gaps in Section 1983, to avoid either ignoring the statute entirely or undermining uniformity in civil rights law), and Theodore Eisenberg, *State Law In Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980) (arguing that courts should rarely apply Section 1988 in cases brought under Section 1983 to avoid disuniformity in civil rights law), with *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017) (instructing courts to “look first to the common law of torts” to define the elements and rule of accrual of a Section 1983 claim). These four commentators deeply disagree with each other’s interpretation of Section 1988, and I am unaware of interventions in this debate in the decades since. See Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. REV. 547, 561 (2020) (noting the “infrequent occasions in which scholarly literature has addressed” Section 1988).
25. Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1076-77 (1989); Eisenberg, *supra* note 24, at 525 (suggesting Section 1988 contains “unsolved mysteries”).

disregarding Section 1988. If the members of the Court are indeed “all textualists now,”²⁶ these recent cases ignoring the text of both Section 1983 and Section 1988 stick out like a sore thumb. Moreover, requiring proof of a common-law tort leaves certain victims of constitutional violations uncompensated and subverts the “independence of the § 1983 remedy” from state law.²⁷ The theoretical implications go beyond Section 1983. From the Second Amendment to standing doctrine to habeas law, the Roberts Court has increasingly relied on the historical common law.²⁸ That methodology, if taken for granted, would freeze the scope of rights to what they were in either 1791 or 1871.²⁹

The analysis proceeds in three Parts. Part I assesses the Court’s approach to the elements of Section 1983 claims. Without offering a distinction, the Court has vacillated between the common law and the underlying substantive constitutional right in determining the elements of a Section 1983 claim. Part II interprets Section 1988, identifying the appropriate standards for borrowing state law in actions under Section 1983. It then argues that Section 1988’s three-step framework governs the elements and immunities of Section 1983 claims, not just limitations and survivorship. Finally, Part III applies Section 1988 to argue that the Court has been wrong to import common-law tort elements and immunities into Section 1983.

I. Section 1983 as a Prism for Constitutional Rights Enforcement

The Court has not precisely—or consistently—explained the relationship between Section 1983 and the common law. To lay the groundwork for tackling Section 1988, then, we must first lay out the Court’s interpretation of the elements of Section 1983.³⁰ This Part begins with the text and structure of

26. HARVARD LAW SCHOOL, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:29 (YouTube, Nov. 25, 2015), <https://perma.cc/TG4B-328T>.

27. Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 727–28 (1997).

28. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2145–46 (2022) (surveying common-law criminal offenses to determine whether the Second Amendment protects the right to peaceably public carry firearms); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (requiring a “close historical or common-law analogue” for an Article III injury-in-fact); *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969–70 (2020) (interpreting the Suspension Clause to protect only the relief available under “the common-law habeas writ”).

29. That is, the extent of rights would be pegged to either 1791, when the Bill of Rights was originally ratified, or 1871, when Congress originally enacted Section 1983. *See* *Timbs v. Indiana*, 586 U.S. 146, 150 (2019); *Civil Rights Act of 1871*, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985–1986).

30. For brevity, this Note focuses on Section 1983 at the expense of *Bivens*, another important vehicle for civil rights enforcement, though available only against federal
footnote continued on next page

Section 1983.³¹ It then contrasts two lines of cases. In the first, the Court has imported common-law tort elements into certain Section 1983 First Amendment and Fourth Amendment claims.³² In the second, the Court has simply looked to the underlying constitutional right for the elements of a Section 1983 claim.³³ As we shall see, it is not altogether clear why a given Section 1983 claim falls into one line of cases or the other. Nor has the Court expressly decided whether common-law tort elements are elements of the underlying constitutional violation or instead “statutory” elements of a Section 1983 claim.

A. Textual Elements of Section 1983 Claims

Section 1983’s text makes liable: (1) “[e]very person who” (2) acting “under color of” state law (3) “subjects, or causes to be subjected” the plaintiff to (4) “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”³⁴ As that text suggests, Section 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights

officers and increasingly constrained in recent years. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971); Fallon, *supra* note 23, at 951-61. *Bivens* claims are seemingly subject to the same common-law tort requirements as the Section 1983 constitutional tort claims this Note discusses. See *Hartman v. Moore*, 547 U.S. 250, 257-58 (2006). However, requiring *Bivens* plaintiffs to prove the elements of a common-law tort could be justified on distinct grounds. Namely, the *Bivens* Court grounded the cause of action it identified in the power of “federal courts” to “use any available remedy to make good the wrong done.” *Bivens*, 403 U.S. at 396 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); see also *id.* at 400-07 (Harlan, J., concurring in the judgment) (analogizing the *Bivens* remedy to the remedies permitted by the equity power of federal courts, though damages are a “traditional remedy at law”). As a judge-made remedy, *Bivens* is subject to any prudential limitations the Court deems appropriate. See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022); *Carlson v. Green*, 446 U.S. 14, 24 n.11 (1980) (noting in passing that “Section 1988 does not in terms apply to *Bivens* actions, and there are cogent reasons not to apply it to such actions even by analogy”). The Roberts Court’s hostility to *Bivens* and its application to any “new contexts” may foreclose any novel constitutional tort theories against federal officers. See *Egbert*, 142 S. Ct. at 1803.

On the other hand, the Court has indicated that the rules governing Section 1983 and *Bivens* actions should be made consistent on the grounds that federal officers should be held to the same standards of liability as state officers. See Katherine Mims Crocker, *Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1410-11 (2019); *Wilson v. Layne*, 526 U.S. 603, 609 (1999). The application of Section 1988 to eliminate common-law tort elements from Section 1983 claims could thus justify the same under *Bivens*.

31. See *infra* Part I.A.

32. See *infra* Part I.B.

33. See *infra* Part I.C.

34. 42 U.S.C. § 1983; see MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.04 (Wolters Kluwer 4th ed. 2025).

elsewhere conferred by those parts of the United States Constitution.”³⁵ In Justice Scalia’s formulation, it is “a prism through which many different [rights] may pass.”³⁶

Each of these textual elements does work in screening out certain kinds of claims.³⁷ But otherwise, Section 1983’s role as a mere vehicle for vindicating constitutional rights means that courts must interpret the Constitution to determine the elements a plaintiff must prove to show the deprivation of rights. Thus, for example, Section 1983’s causation element does not itself vary with the constitutional right nor “the form of relief sought.”³⁸ But the particular constitutional right asserted may come with its own peculiar causation requirement.³⁹ Similarly, Section 1983 itself contains no mens rea element.⁴⁰ Establishing the deprivation of a constitutional right may, however, require proving a mens rea (for example, “discriminatory purpose” for a violation of rights secured by the Equal Protection Clause).⁴¹

If these textual elements are satisfied, Section 1983 provides that the defendant “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”⁴² This language specifies appropriate remedies in an action brought under Section 1983, which the Court has accordingly recognized as including “monetary, declaratory, or injunctive relief.”⁴³ But that remedial language does not specify additional elements for a Section 1983 claim. As the Court has noted, “the phrase ‘or other proper

35. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

36. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 724 (1999) (Scalia, J., concurring in part and concurring in the judgment).

37. For one, the Court has held that a state is not a “person” under Section 1983, *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 64 (1989), while a municipality is, *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). Moreover, the “subjects, or causes to be subjected” causation element is stringent for municipalities. *See id.* at 694. Courts have also interpreted this causation requirement to include proximate cause principles. *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§ 3:106-:107 (West 2025).

38. *Los Angeles County v. Humphries*, 562 U.S. 29, 37 (2010).

39. The *Mt. Healthy* burden-shifting framework for First Amendment claims is one example of a causation requirement specific to a constitutional claim. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977) (“formulat[ing]” a causation test and noting that, “[i]n other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused”).

40. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

41. *See Washington v. Davis*, 426 U.S. 229, 240 (1976).

42. 42 U.S.C. § 1983.

43. *Humphries*, 562 U.S. at 37 (emphasis omitted) (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978)).

proceeding for redress' is simply an expansive alternative to the preceding phrases . . . intended to avoid any unwanted technical limitations."⁴⁴

The text of Section 1983 contains no suggestion, then, that courts applying it should go traipsing through the historical common law. Reviewing Section 1983's legislative history would thus be gilding the lily. But it is comforting to know that said legislative history reinforces, rather than detracts from, this Note's conclusions. The Reconstruction Congress enacted its text as part of the Civil Rights Act of 1871, often called the Ku Klux Klan Act.⁴⁵ The legislative history suggests that Congress intended to "override certain kinds of state laws," "provide[] a remedy where state law was inadequate," and "provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."⁴⁶ As the next Subpart shows, however, the Court has nonetheless resorted to state common law.

B. The Common Law of 1871 as a Source of Elements of Section 1983 Claims

The Court has often imported additional elements of Section 1983 damages claims from the common law of 1871 without citing Section 1988,⁴⁷ though only in the First and Fourth Amendment contexts.⁴⁸ The Court's analysis in these cases raises a key question: Are these additional, common-law elements necessary to state a Section 1983 damages claim, or instead to prove the underlying constitutional violation? This Subpart concludes that the former is true: The Court has been using the common law to interpret the scope of the statutory remedy under Section 1983, not the scope of the constitutional rights it vindicates.

44. *Smith v. Wade*, 461 U.S. 30, 36 n.5 (1983). This expansive addendum, as well as the unqualified "shall be liable" text earlier in Section 1983, poses the greatest problems for a hyperformalist reading that the statute merely authorized existing state causes of action to be brought in federal court. See Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 897, 924 & n.216 (2024).

45. See Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986); *Monroe v. Pape*, 365 U.S. 167, 171 (1961), *overruled in part on other grounds by Monell*, 436 U.S. 658.

46. *Monroe*, 365 U.S. at 173-74. Later scholarship has vindicated the *Monroe* majority's view. See generally, e.g., David Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law*, 1999 UTAH L. REV. 1 (showing that Section 1983's legislative history reflects congressional intent to impose liability for civil rights violations committed under the pretense of state authority, especially in the South where "outrages" had been committed due to the failure of local authorities).

47. See NAHMOD, *supra* note 37, § 3:4.

48. See *infra* Parts I.B.2-.3.

Even so, the Court's refusal to expressly answer that question has created its own problems. Take *Reichle v. Howards*.⁴⁹ In that case, the plaintiff sued the defendant officers under both Section 1983 and *Bivens* for arresting and searching him in violation of the First and Fourth Amendments.⁵⁰ The plaintiff contended that the officers were not entitled to qualified immunity, which "shields government officials from civil damages liability" unless they violate a "clearly established" right.⁵¹ Per the plaintiff, any failure to prove common-law elements went to his "ability to recover damages" under Section 1983 and *Bivens*, not whether the defendants "violated his clearly established First Amendment right."⁵² But the Court dodged that question, holding that the defendants were entitled to qualified immunity precisely because it had not made clear whether its cases are "best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery."⁵³

This right-remedy distinction is critical to Section 1988, too. That is because Section 1988 governs the adjudication of Section 1983 claims but does not—and could not—alter an individual's constitutional rights. And Section 1983 is merely a vehicle to vindicate those constitutional rights.⁵⁴ Thus, if, for example, proving the elements of malicious prosecution is essential to making out a Fourth Amendment violation (or, at least, one based on a prosecution), then there is no question that such elements apply in Section 1983 actions. While one might still oppose interpreting the Fourth Amendment to require plaintiffs to prove the tort of malicious prosecution, Section 1988 would be irrelevant to that argument. But if the Court is instead interpreting Section 1983 itself, as this Note argues, then Section 1988 is relevant to whether that approach is correct.

49. 566 U.S. 658 (2012).

50. *Id.* at 662.

51. *Id.* at 664, 669 n.6; see *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam). For critiques of qualified immunity, see generally, for example, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018), offering a criticism of qualified immunity's doctrinal basis and effectiveness as policy; and John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*, 62 FLA. L. REV. 851 (2010), asserting that qualified immunity's "clearly established" prong is unduly narrow, resulting in underenforcement of generally defined constitutional rights.

52. *Reichle*, 566 U.S. at 669 n.6.

53. *Id.* Tellingly, Judge Andrew Oldham, concurring in a recent en banc Fifth Circuit decision, opined that the common-law elements "concern[] only remedies, not rights," but still explored the implications were he wrong. *Villarreal v. City of Laredo*, 134 F.4th 273, 279, 281-82 (5th Cir. 2025) (en banc) (Oldham, J., concurring). Judge Oldham rested his conclusion partially on the Supreme Court's language in *Lozman v. City of Riviera Beach*, emphasizing "recourse" and "redress" for rights. *Id.* at 279 (emphasis omitted) (quoting *Lozman*, 585 U.S. 87, 100 (2018)).

54. See *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

1. The origins of the common-law analogy in Section 1983 cases

The recent cases requiring Section 1983 plaintiffs to prove the elements of a common-law tort are the result of the Court, over decades, gradually building on the premise that Section 1983 creates a kind of tort liability.

This trajectory began in *Monroe v. Pape*, where the Court relied on the uncontroversial proposition that Section 1983 “should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.”⁵⁵ That is, a defendant need not act “wilfully” in the criminal-law sense to be liable under Section 1983.⁵⁶ The Court expanded on this idea in *Carey v. Piphus*, concluding that “the common law of torts . . . provide[s] the appropriate starting point” for rules governing damages under Section 1983, as tort law had previously been used to inform Section 1983 immunities, and Section 1988 incorporates “the common law of the States.”⁵⁷ At the same time, the Court caveated that courts must “adapt[] common-law rules of damages to provide fair compensation” because “[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.”⁵⁸ Finally, in *Heck v. Humphrey* and subsequent cases, the Court abandoned that qualification and simply required plaintiffs to prove the elements of “the closest [common-law] analogy to claims of the type considered” in the case at hand.⁵⁹ Thus the plaintiff-friendly principle that Section 1983 sounds in tort—perhaps as compared to criminal law⁶⁰ or

55. 365 U.S. 167, 187 (1961), *overruled in part on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

56. *Id.*; see Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1447 (1989) (noting Justice Douglas’s “limited agenda”); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1719-20 (1989) (discussing the Court’s “tort rhetoric” in Section 1983 cases prior to *Heck v. Humphrey*, 512 U.S. 477 (1994)).

57. 435 U.S. 247, 257-58, 258 n.13 (1978).

58. *Id.* at 258; cf. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (rejecting the notion “that the precise contours of official immunity” under Section 1983 “can and should be slavishly derived from the often arcane rules of the common law”); *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012) (noting that Section 1983 is not “simply a federalized amalgamation of pre-existing common-law claims”).

59. 512 U.S. 477, 483-84 (1994). Though, sometimes, the Court has asked whether the common-law tort elements are “consistent with ‘the values and purposes of the constitutional right at issue.’” *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022) (quoting *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017)). *But see* *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726-27 (2019) (not doing so).

60. See *Monroe*, 365 U.S. at 187 (declining to require a “wilfull[ness]” mens rea in Section 1983 suits).

contract⁶¹—became a hyperformalist, defendant-friendly requirement to identify and prove an analogous common-law tort.⁶² While some members of the Court have contested the application of particular common-law analogies, they all seem to agree on the legitimacy of searching for common-law tort analogs in Section 1983 cases.⁶³

As these Section 1983 elements cases reveal, the Court’s constitutional tort jurisprudence has built on earlier, more modest decisions to arrive at far-reaching, defendant-friendly results. Others have observed that the same is true of the Court’s modern qualified immunity doctrine.⁶⁴ First, in *Pierson v. Ray*, the Court recognized “the defense of good faith” to a Section 1983 claim for violation of the Fourth Amendment by arresting police officers because it was available “in the common-law action for false arrest and imprisonment.”⁶⁵ Then in *Scheuer v. Rhodes*, the Court extended the good-faith defense to other claims—there, alleged due process violations by the governor of Ohio and other high-level executive officers for their role in the Kent State massacre.⁶⁶ The Court reasoned that, perhaps as a policy matter, high-level executive officers’ “range of discretion must be comparably broad.”⁶⁷ Finally, in *Harlow v. Fitzgerald*, the Court jettisoned the subjective good-faith analysis for an “objective reasonableness” test to “avoid excessive disruption of government.”⁶⁸ In short, the Court expanded a limited good-faith defense for false-arrest-like cases into a generalized immunity against Section 1983 and *Bivens* claims.⁶⁹

2. First Amendment retaliation claims

To determine whether the common-law elements relate to the statutory *remedy* or the constitutional *right*, it makes sense to first ask what the constitutional right at hand covers.

Start with the First Amendment, which protects, among other rights, “the freedom of speech.”⁷⁰ The Court has recognized that this right generally forbids the government from retaliating against someone because of their

61. See *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1455 (2023) (declining to apply common-law contract principles to Section 1983).

62. See Beermann, *supra* note 27, at 705-06.

63. See *infra* Parts I.B.2-.3.

64. See, e.g., Baude, *supra* note 23, at 52-55, 60-61.

65. 386 U.S. 547, 555-57, 555 n.9 (1967) (citing *Tenney v. Brandhove*, 341 U.S. 367 (1951), which recognized legislative immunity from Section 1983 claims).

66. See 416 U.S. 232, 234, 247-48 (1974).

67. *Id.* at 247.

68. 457 U.S. 800, 818 (1982).

69. See Baude, *supra* note 23, at 53; Schwartz, *supra* note 51, at 1802.

70. U.S. CONST. amend. I.

speech.⁷¹ Thus, a criminal defendant's First Amendment rights are violated by a selective prosecution on account of their speech, even if there is probable cause to believe they are guilty.⁷² But when plaintiffs seek damages because a retaliatory arrest or prosecution violated their First Amendment rights, the Court has recently required them to prove elements of the common-law tort of malicious prosecution. And one of those elements is that the arrest or prosecution lacked probable cause.⁷³

The no-probable-cause element in Section 1983 First Amendment retaliation claims came to be as follows. First, in *Hartman v. Moore*, the Court held that a *Bivens* plaintiff claiming a retaliatory prosecution in violation of the First Amendment must “show[] an absence of probable cause.”⁷⁴ Thus, the plaintiff in that case would have to prove that the defendant government officials initiated the criminal prosecution against him without probable cause to do so.⁷⁵ That is so, the Court reasoned, because “the complexity of causation in a claim that prosecution was induced by an official bent on retaliation” justified “defining the elements of the tort” to include this “high[ly] probative” and low “cost” showing.⁷⁶ The Court nonetheless kept the common law at arm's length, treating it as “a source of inspired examples” without deciding which of malicious prosecution or abuse of process is “the closer common-law analog to retaliatory prosecution.”⁷⁷

That brings us back to *Nieves*, in which the Court extended *Hartman*'s “without probable cause element” to Section 1983 claims based on retaliatory arrests, citing the “causal complexities” between “the defendant's alleged

71. See, e.g., *Branti v. Finkel*, 445 U.S. 507, 515-16 (1980); *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998).

72. See *Cox v. Louisiana*, 379 U.S. 536, 557 (1965); cf. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) (holding the First Amendment violated even if the government could have made the decision “for no reason whatever”).

73. See *Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 549-50 (1860) (listing the elements of malicious prosecution as “the fact of prosecution”; “that the defendant was himself the prosecutor, or that he instigated its commencement”; “that it finally terminated in [the plaintiff's] acquittal”; the absence of “reasonable or probable cause”; and “malice”), quoted in *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019). Presumably, the “malice” element of malicious prosecution is necessarily satisfied in a First Amendment retaliation case because the defendant arrested or prosecuted the plaintiff because of her speech. *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019), and *Gonzalez v. Trevino*, 144 S. Ct. 1663 (2024) (per curiam), were retaliatory arrest cases, so the favorable-termination element did not arise. In any event, the Court did not discuss the malice and favorable-termination elements in *Hartman*, *Nieves*, or *Gonzalez*. See *Hartman v. Moore*, 547 U.S. 250 (2006); *Nieves*, 139 S. Ct. 1715; *Gonzalez*, 144 S. Ct. 1663.

74. 547 U.S. at 265-66.

75. See *id.* at 252-54.

76. *Id.* at 265.

77. *Id.* at 258.

animus and the plaintiff's injury."⁷⁸ This time, the Court posited that it must look to "the common law torts that provide the 'closest analogy' to retaliatory arrest claims."⁷⁹ Still, it did not decide whether that analog was false imprisonment or malicious prosecution, since both torts require the absence of probable cause.⁸⁰ The Court also created a carveout from the no-probable-cause element for minor crimes for which officers "typically exercise their discretion not to" make arrests, since probable cause sheds little light on "the causal connection between animus and injury" in such circumstances.⁸¹ The Court hewed to the same line in *Gonzalez v. Trevino*.⁸² There, the Court issued a brief per curiam opinion describing the scope of "the *Nieves* exception" to the no-probable-cause requirement, accompanied by several separate writings contesting the proper common-law analog to a Section 1983 retaliatory-arrest claim.⁸³

The separate writings in *Nieves* shed light on the right-remedy question. Concurring in part, Justice Gorsuch opined that the no-probable-cause requirement could only be justified "as a statutory matter."⁸⁴ After all, "probable cause can't erase a First Amendment violation."⁸⁵ Though he disputed whether false arrest and false imprisonment are analogous to a First Amendment retaliatory-arrest claim, he nonetheless concluded that probable cause could be relevant due to causation and federalism concerns.⁸⁶ Dissenting, Justice Sotomayor agreed that absence of probable cause is not required to show a First Amendment violation.⁸⁷ Instead, she would have applied the same *Mt. Healthy* First Amendment standard for claims not involving arrests.⁸⁸

Pausing on Justice Gorsuch's view that the no-probable-cause element is unnecessary to show a First Amendment violation but justified "as a statutory matter,"⁸⁹ it's unclear what text in Section 1983 does that work. After all,

78. *Nieves*, 139 S. Ct. at 1723-24 (quoting *Reichle v. Howards*, 566 U.S. 658, 668 (2012)).

79. *Id.* at 1726 (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)).

80. *Id.* at 1726-27.

81. *Id.* at 1727.

82. 144 S. Ct. 1663 (2024) (per curiam).

83. *Id.* at 1665-68; *id.* at 1675 (Alito, J., concurring) (rejecting petitioner's call to apply "the malicious-prosecution analogy for some § 1983 retaliatory-prosecution claims" and "the abuse-of-process analogy for others"); *id.* at 1678 (Thomas, J., dissenting) (rejecting petitioner's argument that "an abuse-of-process claim is analogous to [her] retaliatory-arrest claim").

84. *Nieves*, 139 S. Ct. at 1730-31 (Gorsuch, J., concurring in part and dissenting in part).

85. *Id.*

86. *Id.* at 1731-33.

87. *Id.* at 1735 (Sotomayor, J., dissenting).

88. *Id.* at 1736-37.

89. *Id.* at 1730 (Gorsuch, J., concurring in part and dissenting in part).

probable cause has nothing to do with whether the defendant acted “under color of” state law.⁹⁰ Nor can probable cause negate the fact that the defendant “subject[ed], or cause[d] to be subjected”⁹¹ the plaintiff to a First Amendment violation. Justice Gorsuch thus conceded: “[L]ook at that statute as long as you like and you will find no reference to the presence or absence of probable cause as a precondition or defense to any suit.”⁹² Instead, he offered that “Congress adopts statutes” like Section 1983 “against the backdrop of the common law.”⁹³ But the question whether Section 1983 is missing something that must be filled in by the common law is expressly answered by Section 1988.⁹⁴ Its omission from the opinions in *Nieves* is startling.

3. Fourth Amendment malicious-prosecution claims

The Court has also required plaintiffs to prove common-law elements in the context of Fourth Amendment claims. The Fourth Amendment protects “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures.”⁹⁵ Robust caselaw governs whether a search or seizure is unreasonable.⁹⁶ Courts apply that doctrine in criminal prosecutions—for instance, where defendants seek to suppress evidence unconstitutionally seized.⁹⁷ This well-developed doctrine would seem sufficient to determine whether a Section 1983 plaintiff has proven the “deprivation”⁹⁸ of her Fourth Amendment rights. Yet, in the line of cases discussed in this Subpart, the Court has additionally required such plaintiffs to prove the elements of the tort of malicious prosecution as it existed in 1871, including malice, the absence of probable cause, and that the prosecution terminated in their favor.⁹⁹

90. See 42 U.S.C. § 1983.

91. *Id.*

92. *Nieves*, 139 S. Ct. at 1730.

93. *Id.*

94. See *infra* Part III.

95. U.S. CONST. amend. IV.

96. See generally WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (West 2025) (expounding current Fourth Amendment doctrine).

97. See *id.* § 1.1.

98. 42 U.S.C. § 1983.

99. Many Fourth Amendment violations require showing a lack of probable cause, so the malice and favorable-termination elements are the most significant additional hurdles to a successful Section 1983 claim. See *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745, 1750 (2024) (discussing the absence of probable cause for an unreasonable seizure under the Fourth Amendment). *But see* *Groh v. Ramirez*, 540 U.S. 551, 558-59 (2004) (permitting Section 1983 claim for violation of the Fourth Amendment’s particularity requirement for warrants, despite probable cause).

The tort of malicious prosecution is, of course, absent from the text of the Fourth Amendment,¹⁰⁰ and it exists as a state common-law claim regardless of the Constitution and Section 1983.¹⁰¹ Nevertheless, the Court in *Heck v. Humphrey* held that a Section 1983 plaintiff seeking damages because of an unconstitutional prosecution must prove, as an element, the “termination of the prior criminal proceeding in [his] favor.”¹⁰² That is because Section 1983 “creates a species of tort liability”¹⁰³ and “[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here.”¹⁰⁴ The holding in *Heck* had the effect of clarifying and separating the roles that Section 1983 and habeas play when an individual has been unlawfully convicted and confined, though the Court did not root its holding in a need to distinguish the two.¹⁰⁵ Justice Thomas concurred on a two-wrongs-make-a-right rationale: “Given that the Court created the tension between” Section 1983 and the federal habeas statute, the Court could resolve that conflict “in a principled fashion.”¹⁰⁶ No Justice referenced Section 1988. Indeed, the remaining four Justices contested only whether “the tort of malicious prosecution alone provides the answer,” accepting the majority’s premise that the common law “provide[s] a ‘starting point for the inquiry under § 1983.’”¹⁰⁷

Several clues suggest that *Heck* concerned the elements of a Section 1983 damages claim and not the constitutional rights at issue. First, *Heck* is premised on federal habeas relief being available to “call[] into question” the plaintiff’s conviction,¹⁰⁸ and habeas requires that the petitioner be “in custody in

100. See U.S. CONST. amend. IV.

101. See 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* ch. XVI, § 1 & n.(b) (Bos., Little, Brown & Co. 4th ed. 1874); 2 SIMON GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 449 (Bos., Little, Brown & Co. 10th ed. 1868).

102. *Heck v. Humphrey*, 512 U.S. 477, 484, 486-87 (1994). Roy Heck had sued several state officials under Section 1983 for various constitutional violations in his investigation and conviction for voluntary manslaughter, seeking damages. *Id.* at 478-79. When he filed his civil suit, his direct appeal from his conviction was still pending; he also filed two federal habeas petitions. *Id.*

103. *Id.* at 483 (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)).

104. *Id.* at 484.

105. See *id.* at 481-82.

106. *Id.* at 491 (Thomas, J., concurring); cf. Baude, *supra* note 23, at 62-69 (criticizing Justice Scalia’s two-wrongs-make-a-right justification of qualified immunity as a correction of broad interpretations of Section 1983).

107. *Heck*, 512 U.S. at 492 (Souter, J., concurring in the judgment) (quoting *Carey v. Piphus*, 435 U.S. 247, 258 (1978)). This is at odds with Section 1988, which takes “the laws of the United States” as the starting point, and then asks if they are “deficient.” See 42 U.S.C. § 1988(a).

108. *Heck*, 512 U.S. at 487.

violation of the Constitution or laws or treaties of the United States.”¹⁰⁹ Thus, *Heck*’s favorable-termination element is not necessary to prove that a plaintiff’s conviction and confinement were unlawful, or else habeas would be, by definition, unavailable. Second, the Court made no mention of the constitutional rights Mr. Heck claimed were violated.¹¹⁰ Rather, its holding centered on the question when “a § 1983 cause of action for damages . . . accrue[s].”¹¹¹ Third, the Court extended its holding to cover any constitutional claim implicating the validity of a conviction or sentence, such as one based on an unreasonable seizure, suggesting that the precise constitutional right asserted is immaterial.¹¹² Fourth, it distinguished Section 1983 damages claims from other actions involving the same constitutional rights, such as Section 1983 injunctive-relief actions and habeas petitions.¹¹³ Still, *Heck*’s terse reasoning means that these clues in the case are just that: clues, not confirmations. Subsequent Supreme Court decisions have justified *Heck* as furthering “pragmatic considerations” about the roles of Section 1983 and habeas, often without even referencing *Heck*’s analogy to malicious prosecution.¹¹⁴ Notably, the Court made no mention of the common-law tort analogy when it unanimously held this Term, in *Olivier v. City of Brandon*, that

109. 28 U.S.C. § 2254(a).

110. See *Heck*, 512 U.S. 477. They were his Fourth and Fourteenth Amendment rights to be free from “an illegal investigation” that destroyed exculpatory evidence and gathered evidence illegally. Joint Appendix at 4-5, *Heck*, 512 U.S. 477 (No. 93-6188) (capitalization altered).

111. *Heck*, 512 U.S. at 489-90.

112. See *id.* at 486-87, 486 n.6.

113. *Id.* at 481, 486. That is in part because *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973), covers Section 1983 injunctive-relief claims seeking immediate or speedier release from custody. Justice Souter’s opinion also read the majority to be interpreting Section 1983 and not the Fourth Amendment. See *Heck*, 512 U.S. at 493-94 (Souter, J., concurring in the judgment). In his view, importing the elements of malicious prosecution would prevent recovery for a Section 1983 plaintiff who nonetheless proved his conviction was “unconstitutional” simply because he did not also prove malice or the absence of probable cause. *Id.* at 494.

114. See *McDonough v. Smith*, 588 U.S. 109, 116-19 (2019); see, e.g., *Nance v. Ward*, 597 U.S. 159, 167 (2022) (characterizing *Heck* as concerning “the dividing line between § 1983 and the federal habeas statute” without discussing malicious prosecution or tort law); *Skinner v. Switzer*, 562 U.S. 521, 533-34 (2011) (explaining the circumstances where *Heck* makes habeas a “prisoner’s sole remedy”); *Wallace v. Kato*, 549 U.S. 384, 392 (2007) (treating *Heck* as resting upon Congress’s “determin[ation] that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement” (quoting *Heck*, 512 U.S. at 482)); *Wilkinson v. Dotson*, 544 U.S. 74, 78-81 (2005) (explaining that, “[t]hroughout” the *Heck* line of cases, the Court has “focused on the need to ensure that state prisoners use only habeas” to challenge “the duration of their confinement”); *Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (relying on the language of *Heck*’s holding and not its reasoning rooted in malicious prosecution).

the *Heck* bar does not apply to a Section 1983 plaintiff not in custody who seeks purely prospective relief.¹¹⁵

Following *Heck*, the Court squarely recognized a “Fourth Amendment claim under § 1983 for malicious prosecution” in *Thompson v. Clark*, including a favorable-termination element.¹¹⁶ In doing so, it articulated a two-step framework to determine the elements of a Section 1983 constitutional claim¹¹⁷: Courts must “first look to the elements of the most analogous tort as of 1871.”¹¹⁸ Second, courts should apply those elements if “doing so is consistent with ‘the values and purposes of the constitutional right at issue.’”¹¹⁹ Yet the Court made no mention of Section 1988.¹²⁰ The Court went on to explain that “the gravamen” of both a Fourth Amendment “claim for unreasonable seizure pursuant to legal process” and the “tort of malicious prosecution” is “the wrongful initiation of charges without probable cause.”¹²¹ Hence, a plaintiff bringing such a Fourth Amendment claim under Section 1983 must prove lack of probable cause, malicious motive (that is, a “purpose other than bringing the defendant to justice”), and a favorable termination of the prosecution.¹²²

Most recently, the Court in *Chiaverini v. City of Napoleon* interpreted the “‘without probable cause’ element of a [Section 1983] Fourth Amendment malicious-prosecution claim,” hewing to its “‘most analogous’ common-law tort” methodology.¹²³ In both *Thompson* and *Chiaverini*, Justices Alito, Gorsuch, and Thomas vehemently dissented because “the Fourth Amendment and malicious prosecution have almost nothing in common,” pointing instead to “the common-law torts of false arrest and false imprisonment,”¹²⁴ or perhaps “a procedural due process claim for malicious prosecution.”¹²⁵ The upshot is that the Court has been unanimous in hunting for the most analogous common-law tort and grafting its elements onto the Section 1983 constitutional claim.

115. See 146 S. Ct. 916, 922-24 & n.3 (2026). Though, during oral argument Justice Kagan implied that *Heck*’s discussion of how Section 1983 “borrow[s] general tort principles” is one of the “sweeping statement[s]” *Heck* made that the Court may need to cabin. Transcript of Oral Argument at 30-33, *Olivier*, 146 S. Ct. 916 (2026) (No. 24-993).

116. 142 S. Ct. 1332, 1338 (2022).

117. See *id.* at 1337.

118. *Id.*

119. *Id.* (quoting *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017)).

120. See *id.*

121. *Id.* at 1337-38.

122. See *id.* at 1338, 1341.

123. 144 S. Ct. 1745, 1749-50 (2024) (quoting *Manuel*, 580 U.S. at 370).

124. *Thompson*, 142 S. Ct. at 1341, 1343 (Alito, J., dissenting); *Chiaverini*, 144 S. Ct. at 1752 (Thomas, J., dissenting) (“A malicious-prosecution claim bears little resemblance to an unreasonable seizure under the Fourth Amendment.”).

125. *Chiaverini*, 144 S. Ct. at 1755 (Gorsuch, J., dissenting).

4. Doctrinal and normative critiques of the common-law approach

As the First Amendment and Fourth Amendment cases demonstrate, the Court's common-law tort analogy sets out the elements of a Section 1983 claim and not the underlying constitutional right.¹²⁶ Accordingly, Section 1988 governs the choice of law in doing so,¹²⁷ and the Court has erred by ignoring it.¹²⁸

That flawed approach carries practical harms. For one, it may be unworkable. The circuits post-*Thompson* persisted in a “bewildering array of disagreements” as to the requisite elements; for example, some applied state common law rather than circuit-specific common law.¹²⁹ Disuniformity is not necessarily a bad thing if the law is predictable in a given forum. But the lower courts appear genuinely confused by the Court's minimal guidance on what the elements of a Fourth Amendment malicious-prosecution claim are and what those elements require.¹³⁰

Moreover, pegging Section 1983 to the common law greatly weakens its power as a remedy. That is in part because common-law damages suits to

126. For additional evidence, consider that the Court has only imported additional common-law elements in Section 1983 damages actions and not the “suit[s] in equity” the statute also authorizes. 42 U.S.C. § 1983; see Brief for the United States as Amicus Curiae in Support of Vacatur at 17 n.2, *Olivier v. City of Brandon*, 146 S. Ct. 916 (2026) (No. 24-993), 2025 WL 2614681 (making this observation and hypothesizing that a Section 1983 suit for injunctive relief is instead analogous to an equitable suit for an “antisuit injunction” (quoting *Trump v. CASA, Inc.*, 145 S. Ct. 2540, 2554 n.9 (2025))); see, e.g., *Thompson*, 142 S. Ct. at 1335 (damages claim); *Chiaverini*, 144 S. Ct. at 1750 (same); see also Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 NOTRE DAME L. REV. 1763, 1772 (2022) (explaining that equity traditionally did not require “forms of action” with essential “elements”). That may be because claims for injunctive relief—or at least those seeking purely prospective injunctive relief and not, say, release from custody—are not analogous to common-law torts like malicious prosecution. Compare *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (suggesting that the favorable-termination requirement in a Fourth Amendment damages claim implicates the same issue “with respect to injunctive relief challenging conviction in *Preiser [v. Rodriguez]*, 411 U.S. 475 (1973)”), with *Olivier*, 146 S. Ct. at 922 (holding that the *Heck* bar does not apply to a plaintiff “seek[ing] purely prospective relief,” such as “an injunction stopping officials from enforcing [a] city ordinance in the future”). But if the Court's approach is limited to damages claims, then it has not been interpreting the underlying constitutional rights. After all, Section 1983 plaintiffs seeking equitable relief must similarly prove a “deprivation of” constitutional rights. 42 U.S.C. § 1983. And otherwise, these common-law elements would travel wherever the scope of constitutional rights is implicated, including qualified immunity, defenses in criminal proceedings, habeas, and *Ex parte Young* actions. See Tymkovich & Stillwell, *supra* note 22, at 273.

127. See *infra* Part II.

128. See *infra* Part III.

129. See Harper A. North, Note, *Making Section 1983 Malicious-Prosecution Suits Work*, 110 VA. L. REV. 207, 221-24 (2024).

130. *Id.* at 224-26.

vindicate constitutional rights have origins dating back to the Founding, well before Section 1983.¹³¹ For instance, a plaintiff might sue a defendant officer in common-law trespass, and the defendant would assert an affirmative defense of state-law authorization.¹³² The plaintiff would then nullify that defense by combination of the Fourth Amendment and the Supremacy Clause.¹³³ Because such a constitutional tort claim was ultimately a creature of common law, this drama largely unfolded in state court and required proving common-law tort elements irrelevant to the constitutional right at stake.¹³⁴

So if Section 1983 *also* requires proving a common-law tort, then all it really does is grant federal subject-matter jurisdiction where diversity jurisdiction is unavailable.¹³⁵ In fact, Section 1983 would arguably do *less* than grant jurisdiction over all common-law constitutional tort suits. After all, some plaintiffs with a common-law constitutional tort claim won't be able to satisfy all of Section 1983's textual elements.¹³⁶ And fee-shifting cannot explain Section 1983's function because fee-shifting is provided by Section 1988(b) and (c), both enacted over a century later.¹³⁷

Conversely, on the Court's view, Congress must have intended Section 1983 to screen out victims of constitutional violations who cannot prove the elements of a common-law claim. That result is hard to explain. The common law of torts primarily targets private wrongs.¹³⁸ But Section 1983

131. See Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 145-49 (2012).

132. See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506 (1987); see, e.g., CAL. PENAL CODE § 844 (West 2025) (authorizing arresting officers to "break open the door or window of the house in which the person to be arrested is . . . after having demanded admittance and explained the purpose"); N.Y. CRIM. PROC. LAW § 120.80 (McKinney 2025) (similar).

133. See Amar, *supra* note 132, at 1506-07.

134. See Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1125 n.70, 1128-29 & nn.88-89 (1969) (collecting cases involving state-law claims for trespass, conversion, replevin, detinue, or ejectment, including where the plaintiff asserted a federal constitutional right "solely to overcome a [state-law] plea of justification").

135. See 42 U.S.C. § 1983. Notably, the text immediately following what is now Section 1983 in the Civil Rights Act of 1871 granted jurisdiction over suits brought under Section 1983, a redundancy on this reading. See Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. §§ 1983, 1985-1986) (incorporating by reference the jurisdiction provided by the Civil Rights Act of 1866). This jurisdictional counterpart to Section 1983 is codified today at 28 U.S.C. § 1343.

136. For one, Section 1983's causation requirement means *respondeat superior* liability is unavailable, unlike with the tort of malicious prosecution. Contrast GREENLEAF, *supra* note 101, § 449, with *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

137. See Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988(b)); Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079 (codified at 42 U.S.C. § 1988(c)).

138. Thomas W. Merrill, *Is Public Nuisance a Tort?*, J. TORT L., 2011, at 8.

targets only governmental action—conduct “under color of” state law.¹³⁹ The statute thus reflects Congress’s determination, right or wrong, that the unique evils of “governmental interference” require a different approach.¹⁴⁰

C. The Constitution as a Source of Elements of Section 1983 Claims

Elsewhere, the Court has simply looked to the Constitution itself to determine whether a deprivation of rights has occurred.¹⁴¹ In one case, the Court expressly disclaimed the notion that Section 1983 is “a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more.”¹⁴² Indeed, the Court has often bypassed the common law, without explanation,¹⁴³ even in First and Fourth Amendment contexts similar to the ones just discussed.

For example, *Graham v. Connor* held that excessive-force claims must be evaluated under the Fourth Amendment or the Eighth Amendment rather than a “single generic standard.”¹⁴⁴ *Graham* instructed courts to “identify[] the specific constitutional right allegedly infringed” and then assess the “validity of the claim . . . by reference to the specific constitutional standard which governs that right.”¹⁴⁵ The Court did not ask whether the officer’s use of force would have constituted battery or some other tort in 1871. And in *Houston Community College System v. Wilson*, a unanimous Court rejected a First Amendment retaliation claim, with no discussion of the common law.¹⁴⁶ Instead, the Court explained that the history of the First Amendment shows it does not shield an elected official from being censured by his colleagues.¹⁴⁷ Despite both cases involving Section 1983 constitutional tort claims, in neither case did the Court resort to the common law to determine the elements of the claim; nor did it distinguish the cases where it had done so.

These two cases are hardly the only examples of the Court determining the validity of a Section 1983 constitutional claim without looking to

139. 42 U.S.C. § 1983.

140. See West, *supra* note 22, at 905; Fallon, *supra* note 23, at 972-73; Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI-KENT L. REV. 661, 674-75, 686 (1997); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971).

141. West, *supra* note 22, at 902.

142. *Rehberg v. Paulk*, 566 U.S. 356, 366 (2012).

143. See Beermann, *supra* note 27, at 702-03.

144. 490 U.S. 386, 393-94 (1989).

145. *Id.* at 394.

146. See 142 S. Ct. 1253 (2022).

147. *Id.* at 1260-62.

common-law tort elements. The range of constitutional violations actionable under Section 1983 is staggering¹⁴⁸: Dormant Commerce Clause claims,¹⁴⁹ Free Exercise Clause claims,¹⁵⁰ Second Amendment claims,¹⁵¹ Fourth Amendment unreasonable seizure claims,¹⁵² Sixth Amendment effective-assistance-of-counsel claims,¹⁵³ Cruel and Unusual Punishment Clause claims,¹⁵⁴ and Equal Protection Clause claims,¹⁵⁵ to name a few. Section 1983 plaintiffs bringing such claims have sought both damages and equitable relief.¹⁵⁶ Where the Court has looked to the common law in these cases, it is not because the Section 1983 plaintiff must prove the elements of a common-law tort but because the underlying constitutional right in some way references the common law.¹⁵⁷

Perhaps the Court's recent line of Section 1983 elements cases casts doubt on these decisions. But even if courts must now look for the "closest analogy" from "the common law [of] torts,"¹⁵⁸ what would that mean in these contexts? There is no common-law tort analogous to discrimination against interstate commerce, discrimination on account of race, or burdening the free exercise of religion.¹⁵⁹ Nor would we expect to find one. The Framers enshrined these rights in the Constitution precisely because, while some reflected the common law, others were inadequately protected by or even antithetical to it.¹⁶⁰

Part II outlines a more workable approach: applying the text of Section 1988(a).

148. See SCHWARTZ, *supra* note 34, §§ 3.03, 3.24.

149. See, e.g., *Dennis v. Higgins*, 498 U.S. 439, 451 (1991).

150. See, e.g., *Kravitz v. Purcell*, 87 F.4th 111, 115 (2d Cir. 2023).

151. See, e.g., *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2125 (2022).

152. See, e.g., *Torres v. Madrid*, 141 S. Ct. 989, 994 (2021).

153. See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977).

154. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 736, 745-46 (2002).

155. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 251-52 (2003).

156. Compare *id.* at 252 (damages), with *Bruen*, 142 S. Ct. at 2125 (declaratory and injunctive relief).

157. See, e.g., *Bruen*, 142 S. Ct. at 2150 (determining the scope of the Second Amendment by examining whether individuals had a right to carry a firearm at common law); *Torres*, 141 S. Ct. at 995-96 (determining the scope of the Fourth Amendment by examining what constituted a "seizure" at common law).

158. See *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)).

159. *Whitman*, *supra* note 140, at 686-87; see Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1480 (1999); David S. Bogen, *From Racial Discrimination to Separate but Equal: The Common Law Impact of the Thirteenth Amendment*, 38 OHIO N.U.L. REV. 117, 125-26, 125 n.79 (2011).

160. See *Kian*, *supra* note 131, at 161-62.

II. Section 1988 as a Choice-of-Law Rule for Section 1983 Claims

The Reconstruction Congress enacted Section 1988(a) as part of the Civil Rights Act of 1866.¹⁶¹ It is titled “Applicability of statutory and common law,” and provides in full:

The jurisdiction in civil and criminal matters [under the Civil Rights Acts] shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.¹⁶²

While a mouthful, recall that Section 1988(a) boils down to a three-step test: (1) determine if federal law is deficient; (2) if so, identify a state-law rule; then (3) apply that rule if consistent with federal law.¹⁶³ The literature has understandably been daunted, however, by its “torturous syntax” and “opaque legislative history.”¹⁶⁴

This Part supplies the first textualist interpretation of Section 1988(a) and analyzes the few cases applying it. Part II.A surveys the few contexts where the Court has applied Section 1988(a)’s framework, Part II.B interprets its text, and Part II.C argues that it governs other issues too, namely the elements of a Section 1983 damages claim.

A. Section 1988 as a Source of Rules of Limitations and Survivorship

Section 1988(a)’s three-step framework would seem to apply wherever federal law is “deficient.”¹⁶⁵ The Court has nonetheless relied on it in only two narrow contexts: statutes of limitations and survivorship. This Subpart takes each in turn.

161. Ch. 31, § 3, 14 Stat. 27, 27 (codified at 42 U.S.C. §§ 1988).

162. 42 U.S.C. § 1988(a). The remainder of Section 1988 provides for fee-shifting in civil rights actions. *See id.* § 1988(b)-(c).

163. *Burnett v. Graham*, 468 U.S. 42, 47-48 (1984); *see supra* notes 6-9 and accompanying text.

164. Kreimer, *supra* note 24, at 615; Eisenberg, *supra* note 24, at 535; William H. Theis, *Shaw v. Garrison: Some Observations on 42 U.S.C. § 1988 and Federal Common Law*, 36 LA. L. REV. 681, 683 (1976).

165. 42 U.S.C. § 1988(a).

1. Limitations

Congress has not enacted a statute of limitations for Section 1983, nor for Section 1981, a related statute.¹⁶⁶ Accordingly, the Court has looked to state statutes of limitations. In contrast with survivorship, however, the Court has only partially relied on Section 1988 to import state-law rules. In *O'Sullivan v. Felix*, for example, the Court imported the state statute of limitations without citing Section 1988 at all.¹⁶⁷ Likewise, in the Section 1981 case *Johnson v. Railway Express Agency, Inc.*, the Court largely relied on precedent to justify looking to the state statute of limitations, citing Section 1988 only to confirm the validity of this approach in the civil rights context.¹⁶⁸

Then in *Wilson v. Garcia*, the Court expressly applied Section 1988's three-step framework and concluded that the forum state's statute of limitations for personal-injury suits governed Section 1983 actions.¹⁶⁹ While principally concerned with Section 1988's second step—which state-law rule, if any, applies—the Court interpreted the statute to mean that “resort to state law . . . should not be undertaken before principles of federal law are exhausted.”¹⁷⁰ Relatedly, the Court has partially relied on Section 1988 to borrow state-law rules for tolling statutes of limitations.¹⁷¹

2. Survivorship

Survivorship—that is, a plaintiff's ability to vindicate the rights of a deceased rightsholder—is the only other issue to which the Court has applied Section 1988. Section 1983 is silent on survivorship.¹⁷² Nor has Congress

166. See *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004). Section 1981, enacted as part of the Civil Rights Act of 1866, provides in relevant part that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. § 1981; see Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981).

167. See 233 U.S. 318, 319-22 (1914). Instead, the Court deemed it “established beyond controversy” that an action's federal-law character “does not preclude the application of the statute of limitations of the State.” *Id.* at 322.

168. 421 U.S. 454, 462, 464 & n.10 (1975). Indeed, the court went on to ask whether the state statute of limitations was “inconsistent with the federal policy underlying” Section 1981 not because of Section 1988, but because earlier statutes of limitations cases demanded that inquiry. *Id.* at 465.

169. 471 U.S. 261, 267-68, 276 (1985).

170. *Id.* at 268-69.

171. See *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485-86 (1980) (citing *Johnson*, 421 U.S. at 463-65).

172. See 42 U.S.C. § 1983.

enacted a general federal survivorship statute, though the Court has recognized a federal common-law rule of survivorship.¹⁷³ Do Section 1983 claims, then, survive the rightsholder's death?

The Court confronted that question in *Robertson v. Wegmann*.¹⁷⁴ The Court began by recognizing that survivorship of Section 1983 claims is “not covered by federal law,” and so Section 1988 determined which survivorship rule governed.¹⁷⁵ The case arose in Louisiana, whose survivorship statute extended to “a spouse, children, parents, or siblings,” modifying the common-law rule of absolute abatement upon death.¹⁷⁶ The Court held that such state-law rules “provide[] the principal reference point” so long as not “inconsistent with the Constitution and laws of the United States.”¹⁷⁷ It identified the policies expressed in Section 1983 to be “compensation” of those injured and “prevention of abuses of power by those acting under color of state law,” then deemed Louisiana’s statute to be consistent with those policies.¹⁷⁸ While Louisiana forbade survival in a decedent’s personal representative (in *Robertson*, the executor of the rightsholder’s estate), that rule did not undermine Section 1983’s policies.¹⁷⁹ That is because a decedent’s executor is not the person Section 1983 seeks to compensate, and the statute’s deterrent effect is not necessarily diminished because “most Louisiana actions” still “survive the plaintiff’s death.”¹⁸⁰

B. Section 1988’s Three Steps

Armed with the Court’s few applications of Section 1988, we return to interpret its text. An early scholar remarked that “[c]ommentators have all but ignored section 1988” and that “no one has” offered “a detailed reading of the

173. See, e.g., *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884).

174. 436 U.S. 584 (1978).

175. *Id.* at 588-89.

176. *Id.* at 589, 591.

177. *Id.* at 590 (quoting 42 U.S.C. § 1988(a)).

178. *Id.* at 590-91.

179. *Id.* at 586-87, 591-92.

180. *Id.* at 592. The Court reserved whether a state survivorship statute that provides for abatement may be inconsistent with federal law where the defendant’s illegal acts “cause[] the plaintiff’s death.” *Id.* Most lower courts hold that state survivorship rules that would abate a Section 1983 claim in such circumstances are, in fact, inconsistent with federal law. See SCHWARTZ, *supra* note 34, § 13.02 (collecting cases).

statute.¹⁸¹ That remains largely true today,¹⁸² for a few reasons. For one, courts and scholars take for granted the analogy between Section 1983 and tort law, thus bypassing the need for Section 1988.¹⁸³ After all, the Court announced six decades ago that Section 1983 “should be read against the background of tort liability.”¹⁸⁴ Fair enough. But the Court has now taken that analogy to the extreme and transformed a plaintiff-friendly principle into a defendant-friendly one.¹⁸⁵ Second, prior commentators expressed discomfort with constitutional tort liability varying by state.¹⁸⁶ Those policy considerations are less persuasive in today’s textualist climate. More to the point, the elements and immunities need not vary if, as this Note argues, Section 1983 is not “deficient” simply for lacking some of the rules that govern common-law tort liability.¹⁸⁷

With the ascendancy of textualism in statutory interpretation today,¹⁸⁸ this Subpart gives a fresh interpretation to Section 1988(a)’s three-step framework. In brief, I conclude that Section 1988(a) requires applying federal statutory law unless said law lacks a rule essential to administering Section 1983 claims, in which case the law of the forum state applies so long as it is not contrary to or incongruous with federal law. If all else fails, the court must generate a federal common-law rule consistent with federal law.

1. Are “the laws of the United States” “deficient” in “furnish[ing] suitable remedies”?

Section 1988(a) begins with the presumption that jurisdiction in Section 1983 cases “shall be exercised and enforced in conformity with the laws

181. Eisenberg, *supra* note 24, at 507. Still, Eisenberg went on to suggest that interpreting Section 1988 solely by its text is “fundamentally misguided” and fruitless, and so courts should resort to its context and legislative history. *Id.* at 502. For example, Eisenberg rejects various possible tests for deficiency of federal law under Section 1988(a) because, perhaps as a policy matter, they would give the statute’s application “too broad a scope” or leave too much discretion to judges. *Id.* at 511-12. Ultimately, resort to legislative history and purpose also proves unhelpful: Eisenberg declares the statute’s limitation to civil rights actions “another of the unsolved mysteries of section 1988.” *Id.* at 525.

182. *See supra* note 24 and accompanying text.

183. *See supra* Part I.B.

184. *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

185. *See supra* Part I.B.1.

186. *E.g.*, Eisenberg, *supra* note 24, at 511 (finding it “unsatisfactory” to “give[] section 1988, and its commitment to state law, too broad a scope”); Kreimer, *supra* note 24, at 615 (similar).

187. *See infra* Part III.

188. *See* Beerermann, *supra* note 27, at 698-99.

of the United States, so far as such laws are suitable to carry the same into effect.”¹⁸⁹ The next clause provides a choice-of-law rule for where the presumption fails: that is, where “the laws of the United States . . . are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law.”¹⁹⁰ This first step raises two interpretive questions.

First, what do “the laws of the United States” include? At a minimum, the Court’s construction of the similar term “and laws” in Section 1983 suggests they must include federal statutes.¹⁹¹ Rules of federal common law, by contrast, are not “laws of the United States.”¹⁹² The strongest argument against their inclusion is that federal common law is not a fixed body of law, so it makes little sense to ask whether it is “deficient” in the sense of missing a rule of decision. Indeed, if federal courts may apply federal common law in Section 1983 actions, that raises the possibility that they may generate a new federal common-law rule in the proceeding itself such that federal law is never deficient and the rest of Section 1988(a) is surplusage.¹⁹³ That can’t be right.

Are provisions of the Constitution “laws of the United States”? Section 1988(a)’s third step asks whether the common-law rule is “not inconsistent with the Constitution and laws of the United States,” so to avoid another surplusage, “laws of the United States” cannot itself include the Constitution.¹⁹⁴ Section 1983’s similar locution, “rights . . . secured by the Constitution and laws,” bolsters this result.¹⁹⁵ Of course, that does not imply

189. 42 U.S.C. § 1988(a).

190. *Id.*

191. *See* *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). The Court impliedly adopted this view in *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984), holding that the full faith and credit statute, 28 U.S.C. § 1738, applies in Section 1983 actions brought in federal court to require the application of state preclusion law.

192. *Robertson v. Wegmann*, 436 U.S. 584, 587-88 (1978). Justice Blackmun, dissenting in *Robertson*, would include federal common law. *Id.* at 596-99 (Blackmun, J., dissenting); *accord* Kreimer, *supra* note 24, at 628-29, 628 n.120.

193. Eisenberg, *supra* note 24, at 513-14. *But see* CONG. GLOBE, 39th Cong., 1st Sess. 1271 (1866) (statement of Rep. Michael C. Kerr) (reading Section 1988 to confer such power on the federal courts). Two other arguments reinforce this conclusion. First, the text of Section 1988(a) refers to “the common law” shortly thereafter, suggesting the different term, “the laws of the United States,” excludes federal common law. 42 U.S.C. § 1988(a); Eisenberg, *supra* note 24, at 515; *see* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 170 (2012) (discussing the meaningful-variation canon). Second, the original public meaning of “laws of the United States” likely would have excluded common law in the *Swift* era of general law. *See* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), *overruled by*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

194. 42 U.S.C. § 1988(a).

195. *See id.* § 1983; SCALIA & GARNER, *supra* note 193, at 170-71 (discussing the consistent-usage canon).

that jurisdiction in Section 1983 cases can be exercised not “in conformity with” the Constitution; that is foreclosed by the foundational Article III principle of judicial review of statutes. But “laws of the United States” excluding the Constitution does provide a textual argument that Section 1988 does not authorize courts to even ask whether the Constitution is somehow “deficient”: Since Section 1988 does authorize courts to assess deficiencies in federal *statutes*, then by negative implication, courts should not also look for deficiencies in the Constitution.¹⁹⁶

Second, when is federal law “deficient” in “furnishing suitable remedies”?¹⁹⁷ Contemporaneous dictionaries primarily defined “deficient” to mean “[w]anting to make up completeness,” “[w]anting a part,” “[l]acking a full or adequate supply,” and the like.¹⁹⁸ Those definitions are admittedly somewhat vague. Still, thinking of “deficient” as meaning something like “incomplete” accords with *Felder v. Casey*, in which the Court reasoned that Section 1988 applies where “federal civil rights laws fail to provide certain rules of decision thought *essential* to the orderly adjudication of rights.”¹⁹⁹ Under this “essential” standard, federal law is not necessarily “deficient” simply because it does not address an issue. The Court in *Felder* thus held that Section 1983’s lack of a “notice-of-claim provision”—which would require plaintiffs to provide defendants with written notice of the claim by a certain deadline—“is not a deficiency.”²⁰⁰ That is because notice-of-claim provisions “are neither universally familiar nor in any sense indispensable prerequisites to litigation,” unlike “statutes of limitation.”²⁰¹

196. *Cf.* *Giles v. Harris*, 189 U.S. 475, 482-84, 487 (1903) (reasoning that “state constitutions were not left unmentioned in [Section 1983] by accident” to affirm dismissal of a suit to enjoin enforcement of a state constitutional provision).

197. Eisenberg asserts that federal law can only be deficient where “a substantive state rule, civil or criminal, is the source of the action.” Eisenberg, *supra* note 24, at 531. While this interpretation is certainly less “awkward[]” because it avoids applying Section 1988 outside of the rare state-law claim removed to federal court and involving a violation of the Civil Rights Acts, Eisenberg does not purport his reading of deficiency to be “reconcilable with section 1988’s language.” *See id.* at 515, 531-33, 543. He also admits a possible redundancy between this reading and the Rules of Decision Act, which already applies state decisional law in federal diversity actions arising under state law. *Id.* at 542 n.142; *see* 28 U.S.C. § 1652.

198. *See* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 346 (Chauncey A. Goodrich & Noah Porter eds., Springfield, Mass., G. & C. Merriam 1865); JOSEPH E. WORCESTER, DICTIONARY OF THE ENGLISH LANGUAGE 373 (Bos., Hickling, Swan & Brewer 1860).

199. 487 U.S. 131, 139 (1988) (emphasis added).

200. *Id.* at 140.

201. *Id.* This conclusion was largely dicta as the Court determined “the question is not one of adoption [of state law] but of pre-emption.” *Id.* at 140-41.

Defining “deficient” as lacking an essential rule explains the survivorship and limitations cases. When the Court in *Robertson* held that Section 1988 generally requires borrowing the forum state’s rule of survivorship, it reasoned that federal law is “deficient” where it “does not ‘cover [an] issue that may arise in the context of a federal civil rights action.’”²⁰² Putting *Robertson* and *Felder* together, a rule is “essential” where it is “indispensable” and “universally familiar,”²⁰³ and thus “may arise” regardless of the right asserted.²⁰⁴ In other words, an essential rule is not just important, but also trans-substantive. Survivorship fits that bill: No matter the constitutional right involved, a court may have to decide whether the action may proceed should the rightsholder pass away.

Statutes of limitations are likewise essential, for two reasons: repose and reliability. First, the Court in *Board of Regents of the University of New York v. Tomanio* explained that statutes of limitations are necessary to protect a potential Section 1983 defendant’s interest in “repose,” meaning their “settled expectations that a substantive claim will be barred” at some point in time.²⁰⁵ Accordingly, the Court held that it must borrow the forum state’s statute of limitations, citing Section 1988.²⁰⁶ Second, *Tomanio* reasoned that statutes of limitations are “fundamental to a well-ordered judicial system.”²⁰⁷ Once “the memories of witnesses have faded or evidence is lost,” it is too late to reliably adjudicate a claim.²⁰⁸ These two interests are both important and trans-substantive. That is, a defendant must eventually enjoy repose, and the proceeding must be a reliable one, no matter which constitutional right a plaintiff seeks to vindicate. Statutes of limitations thus fit squarely into the category of essential rules Section 1988 contemplates borrowing.

Federal law may also be “deficient” under Section 1988 for lacking other rules, including for damages, preclusion, and proximate cause. First, determining the scope of recoverable damages is essential to resolving Section 1983 damages claims. This principle finds some support in *Sullivan v. Little Hunting Park, Inc.*, in which the Court stated that Section 1988 determines the source of the “rule of damages” available in an action under Section 1982.²⁰⁹

202. *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) (quoting *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973)).

203. *Felder*, 487 U.S. at 140.

204. *Robertson*, 436 U.S. at 588 (quoting *Moor*, 411 U.S. at 702).

205. See 446 U.S. 478, 487-88 (1980).

206. *Id.* at 484, 492. The Court also held that state tolling rules applied. *Id.* at 489-92.

207. *Id.* at 487.

208. See *Wilson v. Garcia*, 471 U.S. 261, 271 (1985).

209. 396 U.S. 229, 238-40 (1969). Section 1982 provides that “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens
footnote continued on next page

Still, the Court remanded without applying Section 1988 to determine whether a federal- or state-law rule of damages governed,²¹⁰ and the Court has in other cases determined the scope of damages without applying Section 1988 either.²¹¹ Likewise, the Court in *Allen v. McCurry* held that state preclusion law applies in Section 1983 cases in federal court, though it relied on the Full Faith and Credit statute rather than Section 1988.²¹² Finally, as to proximate cause, neither the Supreme Court nor the federal courts of appeals are clear on what part of Section 1983's text requires proving proximate cause, other than perhaps the loose analogy to tort law, and what standard governs.²¹³ Given this confusion, Section 1988 offers a textual basis to hold that Section 1983 plaintiffs must prove proximate cause, since federal law would be "deficient" if plaintiffs could recover for unforeseeable and attenuated injuries.²¹⁴ All three issues—damages, preclusion, and proximate cause—are trans-substantive and important to litigation.

Having defined "deficient" by looking to whether the missing rule is essential, we are still left with the other two terms in Section 1988's first step: "suitable to carry the same into effect" and "adapted to the object."²¹⁵ In context,

thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C. § 1982.

210. *Sullivan*, 396 U.S. at 240.

211. For example, the Court "looked . . . to the common law of torts (both modern and as of 1871)" in *Smith v. Wade*, concluding that punitive damages are generally available under Section 1983. 461 U.S. 30, 34-35 (1983). The Court made no reference to Section 1988(a), instead justifying its application of modern tort-law principles by concluding that "Congress [could not have] intended to perpetuate a now-obsolete doctrine." *Id.* at 34 n.2. That principle is sound, though the Court might have instead relied on Section 1988(a)'s express incorporation of "the common law, as modified and changed by the constitution and statutes of the State" and not a presumption about congressional intent. *See* 42 U.S.C. § 1988(a). In dissent, Justice Rehnquist criticized the Court for not applying "the laws of the United States" under Section 1988(a), which may have included a punitive damages cap provision in the Fair Housing Act. *See Smith*, 461 U.S. at 90 n.17 (Rehnquist, J., dissenting). In *Carey v. Piphus*, the Court similarly concluded that the common law "provide[s] the . . . starting point" for determining damages rules in a Section 1983 action, only briefly adverting to Section 1988 in a footnote. 435 U.S. 247, 257-58, 258 n.13 (1978).

212. 449 U.S. 90, 96-98 (1980).

213. NAHMOD, *supra* note 37, §§ 3:106, 3:109; *cf.* *County of Los Angeles v. Mendez*, 581 U.S. 420, 431 (2017).

214. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (explaining the centuries-long importance of proximate cause in cases concerning loss); *cf.* *Felder v. Casey*, 487 U.S. 131, 149 (1988) (rejecting an atextual exhaustion requirement for Section 1983 claims, even though a state exhaustion requirement would better "force[] injured persons to seek satisfaction from those alleged to have caused the injury in the first place"). Though Section 1988 would require applying the proximate cause rule of the forum state. *See* 42 U.S.C. § 1988(a).

215. 42 U.S.C. § 1988(a).

there are good reasons to think these nearby terms simply mean “[not] deficient.”²¹⁶ In any event, the Court has not interpreted these terms, and the dictionaries define them synonymously and in vague terms like “fitting” and “proper.”²¹⁷ Still, they contemplate some nexus between two things: “the laws of the United States” and “the same” or “the object,” which refer back to “[t]he jurisdiction in civil and criminal matters conferred on the district courts by the provisions of [the Civil Rights Acts].”²¹⁸ These terms thus apply only where the rule supplied by “the laws of the United States” exists but is perhaps inconsistent with the Civil Rights Acts—not where the federal-law rule is missing entirely. The upshot is that the “deficient” standard governs whether federal law has a gap to be filled. Moreover, for purposes of this Note, it is hard to see how Section 1983’s own elements and immunities could be not “suitable” or “adapted” to “carry[ing]” Section 1983 “into effect.”²¹⁹

2. Does “the common law,” as “modified” by the forum state, provide a rule of decision?

Section 1988(a) permits incorporating the forum state’s common law, not federal or general common law. Otherwise, it would make little sense for the statute to speak of that common law “as modified and changed by the constitution and statutes of the [forum] State.”²²⁰ Perhaps state-by-state variation in the elements of a Section 1983 claim would be unseemly. But that only counsels either not concluding Section 1983’s text is “deficient” in elements to begin with, or else urging Congress to amend Section 1988(a), whose enactment preceded our nationally integrated economy.²²¹ In any event,

216. First, any daylight between these terms (i.e., where a federal-law rule is not “suitable” yet somehow “adapted to the object” and not “deficient”) would create a gap in Section 1988, where federal law does not govern yet the statute says nothing about the choice of law. Second and more generally, only “material variation[s]” in statutory language and not “near-synonyms” trigger the surplusage canon. See SCALIA & GARNER, *supra* note 193, at 170, 178.

217. See WEBSTER, *supra* note 198, at 1323 (defining “[s]uitable” to mean “fitting; accordant; agreeable; proper” and the like); *id.* at 18 (defining “[a]dapt” to mean “[t]o make suitable; to fit, or suit”); WORCESTER, *supra* note 198, at 1444-45 (defining “suitable” to mean “[f]itting; fit; meet; conformable; proper; appropriate” and the like); *id.* at 19 (defining “adapted” to mean “[h]aving adaptation or fitness; suitable”).

218. 42 U.S.C. § 1988(a).

219. *Id.*

220. See *id.* The Court’s dictum in *Carey* that “§ 1988 authorizes courts to look to the common law of the States,” including in “constructing immunities under § 1983” in qualified-immunity cases like *Imbler v. Pachtman*, is incorrect insofar as the Court referenced the general “common law of torts.” *Carey v. Phipps*, 435 U.S. 247, 258 n.13 (1978) (citing *Imbler v. Pachtman*, 424 U.S. 409, 417-19 (1976)).

221. *Cf.* *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1455 (2023) (“We have no doubt that [Petitioner] wishes § 1983 said something else. But that is ‘an appeal
footnote continued on next page”

Section 1988's state-specific approach has the advantage of supplying a predictable rule where there is disagreement between jurisdictions.²²²

That the rule borrowed is subject to the forum state's modification (for example, by statutory or decisional law) also suggests it must be a *modern* rule, not taken from 1871. That might be so even if Section 1988 were not clear on the matter. The common law has long been understood as "fluid and evolving."²²³ It is therefore not obvious that, when Congress enacted Section 1983, the public would have understood it to reference a frozen-in-time body of common law. What is more, it would be particularly odd for the rights enforceable by Section 1983—which evolve over time via decisional law, constitutional amendment, and statute²²⁴—to be subject to damages rules, defenses, and the like frozen in 1871. Yet the Court has taken that approach to Section 1983's elements.²²⁵

What if a state has multiple arguably relevant laws? The Court confronted that question in *Owens v. Okure*, holding that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions."²²⁶ That is because "so many claims brought under § 1983 have no precise state-law analog," making analogy to a "limited category of . . . torts" inappropriate.²²⁷ The Court's reasoning in *Owens* seems to reject its later common-law-tort-analogy approach to the elements of Section 1983 claims. Indeed, the Court in *Owens* criticized such analogies as "ha[ving] less to do with the general nature of § 1983 relief than with counsel's artful pleading and ability to persuade the court that the facts and legal theories of a particular § 1983 claim resembled a particular common-law or statutory cause of action."²²⁸

better directed to Congress." (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part))).

222. Michael Wells notes this problem with borrowing the common law yet does not raise Section 1988 as a solution. See Wells, *supra* note 23, at 183-84.

223. Danielle D'Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910, 940-41 (2023); Tyler, *supra* note 23, at 685-86.

224. Cf. Beermann, *supra* note 27, at 736.

225. E.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019); *Thompson v. Clark*, 142 S. Ct. 1332, 1337 (2022). Asking how modern common-law rules applicable to Section 1983 differ from those of 1871 is beyond the scope of, and somewhat obviated by, this Note.

226. 488 U.S. 235, 249-50 (1989).

227. *Id.* at 249.

228. *Id.* at 240.

3. Is the common-law rule of decision “not inconsistent with the Constitution and laws of the United States”?

As with “deficien[cy]” at Section 1988’s first step, Congress did not define “inconsisten[cy]” at Section 1988’s third step.²²⁹ Contemporaneous dictionary definitions are vague but include “not suitable,”²³⁰ suggesting the same meaning as the “suitable” and “adapted” terms at the first step. Importantly, the dictionaries indicate that “inconsistent” includes both rules that are “[c]ontrary” to federal law and those that are merely “incompatible” or “incongruous.”²³¹

The Court’s construction of the term “inconsistent” accords with the dictionaries, particularly in *Robertson*, where it treated the term in greatest detail. There, the Court held that Louisiana’s state survivorship statute was not “inconsistent” with federal law.²³² In doing so, it declined to interpret “inconsistent” to simply mean any state-law rule that “causes the plaintiff to lose the litigation,” since that would make the source of the law “essentially irrelevant.”²³³ Similarly, the Court rejected the view that disuniformity in civil rights enforcement creates “inconsistency” with federal law, since Section 1988 contemplates state-by-state variation.²³⁴ Indeed, application of a forum state’s law arguably promotes federal-state comity, intrastate uniformity, and predictability.²³⁵ The Court in *Robertson* provided several possible formulations for “inconsistent”: whether the rule “significantly restrict[s] the types of actions that survive,” “generally is inhospitable to survival of § 1983 actions,” or has an “independent adverse effect on the policies underlying § 1983.”²³⁶

In other cases, the Court has similarly interpreted “inconsistent” by reference to the policies of the Civil Rights Acts. In *Tomanio*, the Court explained that the policies underlying Section 1983 are “deterrence and compensation” and that “uniformity” is largely irrelevant given Section 1988’s express invocation of state law.²³⁷ And in *Jett v. Dallas Independent School District*,

229. See 42 U.S.C. § 1988(a). One scholar suggests that this third step essentially restates the Supremacy Clause, though a mere preemption rule would make this clause of Section 1988 surplusage. See Theis, *supra* note 164, at 684.

230. WORCESTER, *supra* note 198, at 737; WEBSTER, *supra* note 198, at 676.

231. WORCESTER, *supra* note 198, at 737; WEBSTER, *supra* note 198, at 676. *Contra* Eisenberg, *supra* note 24, at 532.

232. *Robertson v. Wegmann*, 436 U.S. 584, 593-95 (1978).

233. *Id.* at 593.

234. *Id.* at 593 n.11. *Contra* Kreimer, *supra* note 24, at 615-16.

235. See Herman, *supra* note 25, at 1084.

236. *Robertson*, 436 U.S. at 594.

237. *Bd. of Regents v. Tomanio*, 446 U.S. 478, 488-89 (1980) (citing *Robertson*, 436 U.S. at 593 n.11).

the Court held that respondeat superior liability for municipalities would be “inconsistent” with federal law under Section 1988.²³⁸ That is so, the Court explained, because Congress foreclosed such liability in Section 1983.²³⁹ *Jett* thus demonstrates that—at minimum—a state-law rule is “inconsistent” if it is directly contrary to Section 1983.

While it did not reference Section 1988, the Court performed a similar analysis in *City of Newport v. Fact Concerts, Inc.*²⁴⁰ There, the Court read “municipal immunity from punitive damages” into Section 1983 because that principle “was well established at common law by 1871.”²⁴¹ The Court then concluded that, “[t]o the extent that the purposes of § 1983 have any bearing,” municipal immunity from punitive damages is not inconsistent because punishment is not a prominent purpose of Section 1983, and damages awards against officials “provide[] sufficient protection against” wrongdoing.²⁴² Thus, to recap: Deterrence and compensation, but not uniformity or punishment, are relevant policies for assessing whether a given rule of decision would be “inconsistent” with Section 1983 for purposes of Section 1988.

As a final note, Section 1988 seems to contemplate cases where it will not supply a rule of decision even after its three steps are exhausted. That is, federal law may be “deficient,” yet there may be no applicable state-law rule or that rule may be “inconsistent” with federal law.²⁴³ In such cases, courts must presumably generate *some* federal common law rule of decision to apply.²⁴⁴ But Section 1988 implies that rule must still be “not inconsistent” with federal law, as otherwise that requirement would be evaded.²⁴⁵

C. Expanding the Scope of Section 1988

Equipped with an understanding of Section 1988’s three-step test, the question then becomes to what kinds of rules it applies. Section 1988’s text provides that it applies “in the trial and disposition of the cause” without

238. 491 U.S. 701, 732-33 (1989).

239. *Id.*

240. 453 U.S. 247 (1981).

241. *Id.* at 263.

242. *Id.* at 267-71.

243. *See* 42 U.S.C. § 1988(a).

244. *See* *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) (holding that federal courts may create federal common law where “Congress has not spoken to a particular issue” and there is a “significant conflict between some federal policy or interest and the use of state law” (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966))). *But see* Lindley, *supra* note 44, at 907 (rejecting this view).

245. *See* 42 U.S.C. § 1988(a).

distinguishing between procedural, substantive, or other categories of rules.²⁴⁶ That is, there is no textual reason that Section 1988(a) should apply only to “secondary rules” like survivorship and limitations.²⁴⁷ For elements and immunities as well, Section 1988’s text presumes—absent some deficiency—that “the laws of the United States” apply.²⁴⁸ This Subpart argues for a comprehensive scope for Section 1988(a) based on the negative-implication canon, then answers potential objections based on the common-law derogation canon and statutory *stare decisis*.

1. The negative-implication canon

The negative-implication canon recognizes that, where Congress has granted or prohibited one thing in a category, that choice “implies exclusion” of others in the category.²⁴⁹ As with other canons of construction, the negative-implication canon’s force depends on context. If a mother warns her babysitter only that her child “can’t have oranges,” that implies the child *can* have other common fruits and vegetables. But it does not license the babysitter to take the child to the park—something so outside the category to which “having oranges” belongs that the mother cannot be fairly said to have spoken to the issue.

In enacting Section 1988, Congress spoke to the issue of which common-law rules apply in Section 1983 cases. Indeed, Congress spoke clearly and intricately, adopting a three-step test under which such rules apply only where federal law is deficient and the common-law rule is consistent with federal law.²⁵⁰ Hence, Congress did not impliedly authorize courts to *also* apply a common-law rule absent those two conditions. The negative-implication canon thus dovetails with the canon against surplusage here: Much of Section 1988(a)’s text would have no effect if courts could incorporate common-law rules at their discretion.

Ironically, the Court recognized almost exactly this negative implication in an earlier case, *Moor v. County of Alameda*.²⁵¹ But there, it did so in declining to import a rights-protective state-law rule—California’s law of vicarious liability—into federal law to permit suit under Section 1988 against a

246. See *id.*; see also Beermann, *supra* note 24, at 58 (recognizing that “the text of § 1988 appears to direct the Court at least to look at state law whenever § 1983 is silent on a subject” despite the Court’s more limited application of the statute).

247. See Tymkovich & Stillwell, *supra* note 22, at 241-42 (deeming proper the Court’s application of Section 1988(a) and state tort law to craft such “secondary rules”).

248. See 42 U.S.C. § 1988(a).

249. See SCALIA & GARNER, *supra* note 193, at 107-08.

250. See *supra* Part II.

251. 411 U.S. 693, 701-02 (1973).

municipality.²⁵² The Court explained that its function in borrowing state law is “necessarily limited . . . to those contexts in which Congress has in fact authorized resort to state and common law.”²⁵³ Thus, the Court “[d]id not believe that [Section 1988], without more, was meant to authorize the wholesale importation into federal law of state causes of action.”²⁵⁴ And while Section 1988 permits “federal courts to look to the common law,” the Court recognized that the provision “expressly limits” this “to instances in which that law ‘is not inconsistent with the Constitution and laws of the United States.’”²⁵⁵ It is striking, then, that the Court has imported the *elements* of state causes of action into federal law without express congressional authorization.

A similar negative implication can be drawn from the many instances in the U.S. Code where Congress has expressly provided for the wholesale importation of state common law.²⁵⁶ Consider the Federal Tort Claims Act, which provides that the United States shall be liable “in accordance with the law of the place where the act or omission occurred.”²⁵⁷ Or take the Foreign Sovereign Immunities Act, which provides that foreign states “shall be liable in the same manner and to the same extent as a private individual under like circumstances.”²⁵⁸ Similar examples abound.²⁵⁹ When it enacted Section 1983, Congress could have simply established jurisdiction in the federal district courts over state-law claims by plaintiffs who also plead violations of constitutional duties.²⁶⁰ Because it did not, courts must give effect to that choice.

252. *Id.* This was necessary because *Moor* predated *Monell* by five years. See *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 701 n.66 (1978).

253. *Moor*, 411 U.S. at 701.

254. *Id.* at 703-04.

255. *Id.* at 706 (quoting 42 U.S.C. § 1988(a)).

256. See generally Radha A. Pathak, *Incorporated State Law*, 61 CASE W. RESV. L. REV. 823 (2011) (cataloging and assessing federal law incorporation of state law).

257. 28 U.S.C. § 1346(b)(1).

258. *Id.* § 1606.

259. The Rules of Decision Act, as interpreted in *Erie Railroad Co. v. Tompkins*, applies the “laws of the several states” as “rules of decision in civil actions” “except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide.” 28 U.S.C. § 1652; 304 U.S. 64, 79-80 (1938). And while it imports international law rather than state law, the Alien Tort Statute confers jurisdiction on the district courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350. Other federal statutes contain ambiguities that courts have resolved by reference to state law. See Pathak, *supra* note 256, at 840-41.

260. A reading of Section 1983 to merely confer federal-court jurisdiction, see, e.g., Lindley, *supra* note 44, at 900-01, is particularly awkward given that the subsequent half of Section 1 of the Civil Rights Act of 1871 expressly conferred such jurisdiction, see Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983)

footnote continued on next page

2. The common-law derogation canon

In interpreting Section 1983, the Court has sometimes invoked the principle that “Congress intended [§ 1983] to be construed in light of common-law principles” and not “in derogation of them.”²⁶¹ In other contexts, too, the Court has often relied on the canon against interpreting statutes to derogate from the common law.²⁶² One could invoke the canon to justify maintaining the common-law tort elements and immunities that predated Section 1983.

Still, there are reasons to be skeptical of the derogation canon in general. It rests on a legal fiction that Congress understands and seeks to preserve the common law.²⁶³ And it embodies an anachronistic judicial hostility to positive law in the “Age of Statutes.”²⁶⁴

The derogation canon is particularly ill-suited to Section 1983. The canon requires Congress to “express” its intent to “impose duties or burdens or establish rights or benefits not recognized by the common law . . . plainly and clearly.”²⁶⁵ But Congress expressly provided for derogation of the common law in Section 1988. Rather than taking the common law as a baseline and asking whether federal law clearly derogates from it, as the derogation canon would suggest, Section 1988 takes “the laws of the United States” as a baseline, then applies state law only where federal law is “deficient” and the state-law rule is “not inconsistent” with federal law.²⁶⁶ Applying the derogation canon to Section 1983 thus begs the question whether it automatically incorporates the common law to begin with—a proposition refuted by Section 1988.

(specifying “such proceeding to be prosecuted in the several district or circuit courts of the United States”). Under this reading, “shall . . . be liable” in the first half of that section would be surplusage. *See id.*

Arguably, in order to establish arising-under jurisdiction, Congress may have to create a federal cause of action that expressly imports state common-law elements in addition to a constitutional violation. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492-97 (1983) (discussing the constitutionally permissible scope of arising-under jurisdiction and explaining that pure “jurisdictional statutes” do not suffice to raise a question of federal law). But the result of such a law would be the same.

261. *E.g.*, *Rehberg v. Paulk*, 566 U.S. 356, 362-63 (2012) (alteration in original) (first quoting *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997); and then quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).

262. *United States v. Texas*, 507 U.S. 529, 534 (1993); *see, e.g.*, *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2307 (2021); *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991).

263. *See Krishnakumar, supra* note 23, at 618-19.

264. *Id.* at 619 (quoting Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 769 (2013)); SCALIA & GARNER, *supra* note 193, at 318.

265. 3 SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 61:1 (8th ed. West 2025).

266. *See* 42 U.S.C. § 1988(a).

Regardless, the derogation canon has little to say about remedial statutes that courts ordinarily construe liberally, especially ones like Section 1983 that “reflect new legal systems to deal with new problems, outside of any common-law frame of reference.”²⁶⁷ As previously explained, Section 1983 did not merely confer federal-court jurisdiction over common-law constitutional torts.²⁶⁸ Instead, it created a remedy to vindicate rights newly enshrined in the Reconstruction Amendments—rights not previously recognized by state law like the equal protection of the laws.²⁶⁹

3. Statutory stare decisis and congressional acquiescence

The Court has often explained that “*stare decisis* ha[s] special force in the area of statutory interpretation” because “Congress remains free to alter” the statute’s text.²⁷⁰ Conversely, where Congress has legislated in a space but left certain statutory text intact, the Court has sometimes taken that as an implied acquiescence in interpretations of that text.²⁷¹ That argument could be made of Section 1983. For instance, after the Court in *Pulliam v. Allen* held that there is no judicial immunity from a Section 1983 claim for injunctive relief,²⁷² Congress enacted the Federal Courts Improvement Act to partially abrogate that decision.²⁷³

Still, statutory stare decisis has little force in the Section 1983 elements context for at least three reasons. First, the cases importing common-law elements into Section 1983 are fairly recent. *Nieves* in 2019 is the earliest clear example.²⁷⁴ These cases are not only novel, but they are also incomplete. For

267. SINGER, *supra* note 265, § 61:3; see Alexander A. Reinert, *Qualified Immunity’s Flawed Foundation*, 111 CALIF. L. REV. 201, 234 (2023); see also, e.g., *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (describing Section 1983 as a “unique remedy” that sweeps broader than the scope of state common-law remedies); *Monroe v. Pape*, 365 U.S. 167, 172-73 (1961) (similar), *overruled in part on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

268. See *supra* notes 256-60 and accompanying text.

269. See CONG. GLOBE, 42d Cong., 1st Sess. 608 (1871) (statement of Sen. John Pool) (supporting the Fourteenth Amendment’s conferral of “a new right . . . to the protection of the laws” that the states would be prohibited from denying).

270. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); see, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 280-81 (2009) (Souter, J., dissenting); see also, e.g., *City of Greenwood v. Peacock*, 384 U.S. 808, 834 (1966) (hewing to a narrow reading of the civil rights removal statute, 28 U.S.C. § 1443, in part because it is “century-old” and Congress was “[f]ully aware of” the Court’s consistent reading of it).

271. See, e.g., *United States v. Hansen*, 143 S. Ct. 1932, 1943-44 (2023).

272. 466 U.S. 522, 541-42 (1984).

273. See Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (codified as amended at 28 U.S.C. § 2412 and 42 U.S.C. §§ 1983, 1988).

274. See *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019).

instance, the Court in *Chiaverini* declined to opine on the causation element of a Fourth Amendment malicious-prosecution claim,²⁷⁵ and in *Gonzalez* it declined to decide whether the no-probable-cause rule for retaliatory arrest claims extends beyond split-second arrests.²⁷⁶ Presently, there is not so much stability in the Court's interpretation of Section 1983's elements that Congress can fairly be said to be relying on or acquiescing in it.²⁷⁷

Second, the Court has not been clear about whether the requirement to prove a common-law tort is an interpretation of the Constitution or of Section 1983's text. And while this Note concludes such a requirement must be an (erroneous) interpretation of Section 1983, the Court certainly has not specified which part of that text it is interpreting.²⁷⁸ Congress thus should not be charged with knowing which statutory text, if any, to amend should it have disagreed with *Thompson* or *Nieves*.

Third, Section 1983 is, like the Sherman Act, one of those "older statutes" Congress phrased "in sweeping, general terms, expecting the federal courts to interpret them by developing legal rules on a case-by-case basis in the common-law tradition."²⁷⁹ That is not to say that Section 1983's text is less relevant, nor that it substantively borrows from the common law. But as Section 1988 recognizes, Section 1983 is so general that courts must occasionally identify missing rules of decision to apply in such actions. Given the unique role the courts play in shaping the contours of Section 1983 liability, it is perhaps less realistic to expect Congress to react to decisions it disagrees with by amending the statute.

If anything, statutory stare decisis would seem to militate *against* a reading of Section 1983 that would merely bring common-law constitutional torts into federal court. Recall the numerous decisions, both old and recent, where the Court has not relied on the common law to determine the elements of Section 1983 claims.²⁸⁰ If those decisions were incorrect, Congress could have

275. *Chiaverini v. City of Napoleon*, 144 S. Ct. 1745, 1752 (2024).

276. *Gonzalez v. Trevino*, 144 S. Ct. 1663, 1667-68 (2024) (per curiam).

277. See *Tymkovich & Stillwell*, *supra* note 22, at 266; cf. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2272 (2024) ("Given our constant tinkering with and eventual turn away from *Chevron* [*U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], . . . it instead is hard to see how anyone—Congress included—could reasonably expect a court to rely on *Chevron* in any particular case."); Baude, *supra* note 23, at 80-82 (arguing statutory stare decisis applies less to qualified immunity because the Court "takes more ownership of it than more orthodox statutory doctrines").

278. See *supra* Part I.B.

279. See *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 641 n.12 (1983) (Stevens, J., dissenting) (noting that *Monroe v. Pape*, 365 U.S. 167 (1961), was overruled in part by *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), without congressional action).

280. See *supra* Part I.C.

reacted to them by amending Section 1983 to use some version of the Federal Tort Claims Act's reference to "the law of the place where the act or omission occurred."²⁸¹ It has not.

A variation on the statutory *stare decisis* argument is that Sections 1983 and 1988 were drafted in a pre-textualist era of statutory interpretation. Accordingly, the meaning of those statutes, as understood by Congress and the public at the time they were enacted, would perhaps reach beyond their text and include certain background common-law principles. Yet the Court held in *Alexander v. Sandoval* that such "legal context"—that Congress enacted a statute before textualism became the dominant mode of statutory interpretation—"matters only to the extent it clarifies text."²⁸² In other words, the historical legal context is irrelevant to the extent Section 1988 already makes clear the choice-of-law rule for Section 1983 cases (which it does). Indeed, in the related context of whether a statute confers a right enforceable via Section 1983, the Court has adopted a nearly hypertextualist approach, asking whether the text contains "clear and unambiguous 'rights-creating language.'"²⁸³ It would be particularly incongruous if this harsh textualist approach governed whether Section 1983 permits a plaintiff to enforce "rights . . . secured by the . . . laws," but not whether Section 1983 permits a plaintiff to enforce "rights . . . secured by the Constitution."²⁸⁴

The relevant canons of statutory construction thus confirm what Section 1988 already makes plain: Its three-step framework applies to any circumstance where federal law appears not to speak to an issue arising under the Civil Rights Acts. Those circumstances include the elements and immunities of Section 1983 claims, which the next Part takes up.

281. See 28 U.S.C. § 1346(b)(1).

282. 532 U.S. 275, 287-88 (2001); see also *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

283. See, e.g., *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2235 (2025) (quoting *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1458 (2023) (internal quotation marks omitted)).

284. 42 U.S.C. § 1983. Notably, the petitioner in *Olivier v. City of Brandon* argued that "[t]he plain text" of Section 1983 provides "a cause of action for equitable relief to bar future enforcement of unconstitutional laws" notwithstanding the essentially atextual gloss that *Heck* layered on the statute. Transcript of Oral Argument, *supra* note 115, at 85. Precedents like *Heck* that analogize Section 1983 liability to tort liability thus have not completely deterred litigants at the Supreme Court from, at least occasionally, making textual arguments about Section 1983.

III. Applying Section 1988 to the Elements and Immunities of Section 1983 Claims

Part II interpreted each of Section 1988(a)'s three steps and explained that it governs all choice-of-law questions in Section 1983 cases. This Part applies that framework, concluding that importing common-law tort elements into Section 1983 fails at each of Section 1988's three steps. While immunities present a thornier question, this Note aims to shift the terms of that debate away from the atextual common-law tort analogy and recenter the text of Section 1988.

A. Elements

At Section 1988's first step, the Constitution is not somehow "deficient"²⁸⁵ in determining whether a plaintiff has been "depriv[ed] of any rights . . . secured by the Constitution."²⁸⁶ Rather, the Constitution defines the very rights deprived. Nor are the elements of Section 1983 "deficient" because they lack the elements of a common-law claim. However helpful elements like malice or favorable termination may be, they are not "essential to the orderly adjudication of rights," "universally familiar," or "indispensable prerequisites of litigation," as *Felder* outlined.²⁸⁷ That is, they are neither important to litigation nor trans-substantive.²⁸⁸ After all, federal courts adjudicate plenty of claims where these elements do not appear.²⁸⁹ Even under the lower "deficiency" standard in *Robertson*, there is no reason to think these common-law elements are the type of "issue that may arise in the context of a federal civil rights action" and that Section 1983 must therefore "cover."²⁹⁰ The Court has long adjudicated Section 1983 claims to enforce federal statutory rights without requiring the plaintiff to prove a common-law tort—even though it is

285. 42 U.S.C. § 1988(a).

286. *Id.* § 1983. This is assuming the Constitution is even part of the "laws of the United States." See *supra* notes 194-96 and accompanying text.

287. See *Felder v. Casey*, 487 U.S. 131, 139-40 (1988).

288. See *supra* notes 202-14 and accompanying text.

289. In a recent civil Racketeer Influenced and Corrupt Organizations Act (RICO) case, the Court held that a plaintiff need not prove both a "harm[] that result[ed] from racketeering activity" and "a violation of a right recognized by the common law of torts," rejecting the notion that "the common law of torts supplies the entire universe of relevant rights." *Med. Marijuana, Inc. v. Horn*, 145 S. Ct. 931, 939 n.4 (2025). Civil RICO is a particularly apt analogy because it, too, creates a private right of action, is tersely worded, and incorporates a laundry list of compensable harms. See 18 U.S.C. § 1964(c) (incorporating 18 U.S.C. § 1962, which, in turn, incorporates 18 U.S.C. § 1961(1)'s expansive definition of "racketeering activity").

290. *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978) (quoting *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973)).

Section 1983, not a particular constitutional right, that seemingly creates a “species of tort liability.”²⁹¹

Were it necessary to reach Section 1988(a)’s second step, “the common law” does not even speak to any issue where federal law is deficient. Indeed, whether a defendant has violated a common-law tort duty is “completely irrelevant to” whether that defendant has “violat[e]d a constitutional right.”²⁹² Perhaps there is a substantive due process right to be free from malicious prosecution.²⁹³ But the Court rejected that proposition in *Albright v. Oliver*.²⁹⁴ In any event, there is no reason why recognizing such a right under the Fourteenth Amendment would require a plaintiff asserting their Fourth Amendment rights to prove the tort of malicious prosecution. The Fourth Amendment and malicious prosecution have little to do with one another. While both the tort of malicious prosecution and certain Fourth Amendment violations involve the lack of probable cause,²⁹⁵ the overlap ends there. The Fourth Amendment does not speak of “malice,”²⁹⁶ and the Court has never deemed a search or seizure reasonable merely because the officers lacked malice.²⁹⁷

The third step is the nail in the coffin. It is “inconsistent with”²⁹⁸ Section 1983’s plain text to fail to deem a defendant “liable” who has satisfied each of Section 1983’s textual elements merely because the plaintiff failed to also prove a common-law element such as the absence of probable cause for an allegedly retaliatory arrest or the favorable termination of an allegedly baseless prosecution.²⁹⁹ Nor should the forum state’s common law define the elements of a Section 1983 claim. As the Court has explained, “Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a

291. *Heck v. Humphrey*, 512 U.S. 477, 483-84 (1994) (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986)); see, e.g., *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1445 (2023).

292. Tymkovich & Stillwell, *supra* note 22, at 244; Whitman, *supra* note 140, at 662 n.11.

293. See Tymkovich & Stillwell, *supra* note 22, at 276-77. Note the distinction between the constitutional standard (substantive due process) requiring proof of a common-law tort and Section 1983 doing so.

294. 510 U.S. 266, 268 (1994) (plurality opinion); *id.* at 281-82 (Kennedy, J., concurring in the judgment); *id.* at 286 (Souter, J., concurring in the judgment).

295. See *supra* note 99 and accompanying text.

296. See U.S. CONST. amend. IV.

297. Good faith in the Fourth Amendment context is an objective question and relevant only to whether the exclusionary rule applies, not whether officers violated the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 906, 922 (1984).

298. 42 U.S.C. § 1988(a).

299. See *id.* § 1983; see *supra* Part I.B.2-.3.

federal cause of action.”³⁰⁰ A contrary reading would peg Section 1983 to the availability of a state common-law remedy, subverting Congress’s design.³⁰¹

Perhaps *some* common-law tort elements belong in the Section 1983 analysis. Recall that in *Nieves*, the Court required a lack of probable cause in most First Amendment retaliatory arrest cases as “weighty evidence that the officer’s animus caused the arrest.”³⁰² In the language of Section 1988, then, maybe: (1) Section 1983 is “deficient” in specifying whether a defendant officer “subject[ed], or cause[d] to be subjected” the plaintiff to a deprivation of her First Amendment rights; (2) the “common law” rule is that plaintiffs challenging a retaliatory arrest must prove the absence of probable cause; and (3) that rule “is not inconsistent with the Constitution and laws of the United States.”³⁰³ Except that has not been the Court’s methodology. The texts of Sections 1983 and 1988 played no role in *Nieves*.³⁰⁴ Even if they had, Section 1988 at most justifies applying the current law of the forum state, not the common-law consensus as of 1871.

B. Immunities

The Court has observed that Section 1983 “on its face does not provide for any immunities.”³⁰⁵ Still, it has read immunities into Section 1983 by relying on common-law rationales similar to its approach to elements.³⁰⁶ But as many have pointed out, modern qualified immunity doctrine both strays from the common law and fails as policy.³⁰⁷

Section 1988 adds fuel to that fire through a novel statutory argument.³⁰⁸ Federal law is not “deficient” simply because it does not provide for qualified immunity from Section 1983 cases. Indeed, that the modern qualified immunity never applied in historical common-law constitutional tort suits

300. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985); *see also Carey v. Phipps*, 435 U.S. 247, 258 (1978) (“The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.”).

301. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961), *overruled in part on other grounds by Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978); Beermann, *supra* note 27, at 726.

302. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019).

303. *See* 42 U.S.C. §§ 1988(a), 1983.

304. *See Nieves*, 139 S. Ct. at 1721–28.

305. *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (emphasis omitted).

306. *See supra* notes 64–69 and accompanying text.

307. *See supra* note 51 and accompanying text.

308. Even before the Court created the modern qualified immunity doctrine, a scholar found it “surprising[.]” that the lower federal courts “seldom place[d] express reliance on section 1988” in devising immunities. Theis, *supra* note 164, at 685–86.

dispels any notion that it is “essential.”³⁰⁹ Perhaps deficiency is a closer question for certain absolute immunities, or a more limited qualified immunity for officers acting in subjective good faith.³¹⁰ One scholar has justified qualified immunity under Section 1988 this way, analogizing it to the “survival or limitations defenses” on which Section 1983 is also silent.³¹¹ But even then, Section 1988 would mandate looking to the forum state’s immunities rules, which may be “modified” by state constitution or statute. Importing immunities via Section 1988 would thus require that: (1) The absence of official immunities in federal statutory law makes it “deficient,” and (2) there is an applicable state-law immunity (3) that is not “inconsistent” with federal law.³¹² This chain of reasoning arguably fails at the first step.³¹³ Even if these conditions were true, however, the Court has not followed this approach.³¹⁴

But, one might protest, perhaps the Constitution mandates that government officials enjoy immunities from Section 1983 damages suits, making federal law “deficient” without them (or perhaps making Section 1988 irrelevant altogether). Indeed, Judge Andrew Oldham of the Fifth Circuit has recently justified qualified immunity as a matter of Fourth Amendment law

309. *Felder v. Casey*, 487 U.S. 131, 139 (1988); Baude, *supra* note 23, at 55–61.

310. See generally Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337 (2021) (chronicling immunities at common law).

311. Rosenthal, *supra* note 24, at 563–65.

312. See 42 U.S.C. § 1988(a); *supra* notes 243–45 and accompanying text (describing the generation of federal common law rules under Section 1988 where there is no suitable state-law rule).

313. To save the Court’s immunities doctrines under Section 1988, Lawrence Rosenthal proposes “that the question of whether damages are a ‘suitable’ remedy for a violation of § 1983 is not addressed by that statute.” Rosenthal, *supra* note 24, at 566. *But see* 42 U.S.C. § 1983 (providing that a defendant “shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”); *Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (recognizing that “damages have long been awarded as appropriate relief” in “suits against Government officials,” especially at common law). Further, Section 1988 does not ask whether a federal-law damages remedy (under Section 1983) is a “suitable” remedy. Compare 42 U.S.C. § 1988(a), with Rosenthal, *supra* note 24, at 566. Instead, it asks whether federal law is “suitable to carry [the Civil Rights Acts] into effect,” “adapted to the object,” and not “deficient in the provisions necessary to furnish suitable remedies and punish offenses against law.” 42 U.S.C. § 1988(a). It is hard to see how Section 1983, enacted as part of the Civil Rights Acts, could be not “suitable to carry” itself “into effect.” And Section 1988 operates to “furnish suitable remedies” that Section 1983 is missing, not to strike unsuitable remedies from its text.

314. See Eisenberg, *supra* note 24, at 510 & n.41.

rather than as a statutory matter.³¹⁵ Even granting that proposition,³¹⁶ it would not explain why qualified immunity attaches regardless of the underlying constitutional right. More significantly for this project, reading immunities into the Constitution would undermine the basic rationale supporting many of the Court's Section 1983 immunities and elements cases: that, as a statutory matter, Section 1983 incorporated certain principles from the common law of torts.

In any event, suppose that Section 1988's three-step framework does require importing state-law immunities in cases under Section 1983. If so, the fact that Section 1988 would require immunities (as well as elements) to vary across forums is normatively tolerable.³¹⁷ If anything, any normative concern has less purchase in the immunities context than with elements, since jurisdictional variation in officers' individual liability already exists. States and localities largely indemnify law enforcement officials from settlements and judgments in constitutional tort cases.³¹⁸ In doing so, they exercise local control over and create local variation in, practically speaking, officers' immunity from damages liability.

Conclusion

The Court's recent decisions take for granted that the "species of tort liability" created by Section 1983 requires plaintiffs to prove the elements of an analogous common-law tort.³¹⁹ As this Note illustrates, that assumption is inconsistent with the text of Section 1988. The Court's atextual, common-law approach to the elements of Section 1983 claims carries troubling

315. See Andrew S. Oldham, *Official Immunity at the Founding*, 46 HARV. J.L. & PUB. POL'Y 105, 128-29 (2023).

316. *But see id.* at 128, 132 (acknowledging that one could argue the adoption of the Fourteenth Amendment in 1868 and Section 1983 in 1871 make Founding-era history less relevant).

317. See *supra* notes 220-22 and accompanying text. *Contra* Rosenthal, *supra* note 24, at 567-68. Rosenthal is correct that state-law immunities cannot violate the Supremacy Clause by discriminating against federal causes of action. See *id.* at 568-69; e.g., *Haywood v. Drown*, 556 U.S. 729, 736 (2009). But since Section 1988 expressly incorporates those state-law immunities as federal law, see 42 U.S.C. § 1988(a), any Supremacy Clause problem disappears. Rosenthal also adopts Seth Kreimer's argument that Section 1988 delegates to courts "authority to create a federal common law." Rosenthal, *supra* note 24, at 570 (citing Kreimer, *supra* note 24, at 619). *But see supra* notes 192-93 and accompanying text.

318. See generally Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (describing the prevalence of state and local indemnification policies and spelling out the consequences of those policies).

319. *Heck v. Humphrey*, 512 U.S. 477, 483-84 (1994) (quoting *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305 (1986) (internal quotation marks omitted)); see *supra* Part I.B.

consequences, diminishing the capacity of Section 1983 to remedy and deter constitutional violations. A Section 1983 plaintiff arrested because of her First Amendment-protected speech should not lose merely because the defendant had probable cause to arrest her.³²⁰ Nor should a Section 1983 plaintiff prosecuted without probable cause in violation of the Fourth Amendment lose simply because the defendant acted without malice, or because the prosecution did not terminate in her favor.³²¹ Dismissing claims on these grounds leaves constitutional violations unanswered and victims uncompensated. Whatever policy rationales might support these elements, Congress rejected them by enacting Section 1988.

320. *Contra* Nieves v. Bartlett, 139 S. Ct. 1715, 1723 (2019).

321. *Contra* Thompson v. Clark, 142 S. Ct. 1332, 1338 n.3, 1341 (2022).